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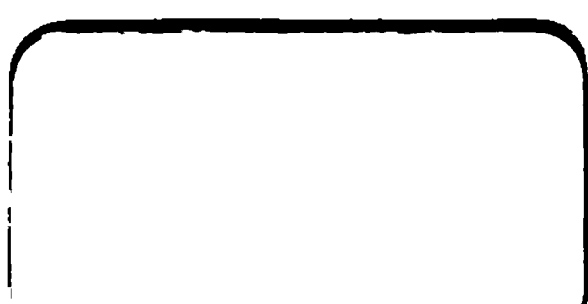
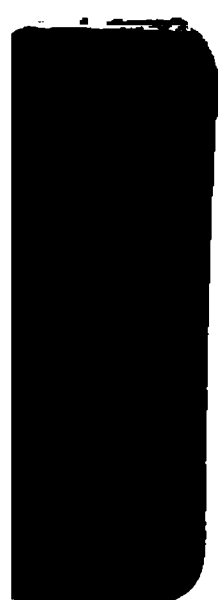
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY.

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XLII.

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AMERICAN STATE REPORTS.
VOL. XLII.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

COMMERCIAL FIRE INS. CO. v. BOARD OF REVENUE.

[99 ALABAMA, 1.]

CORPORATIONS.—CAPITAL STOCK is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and it is a trust fund for the benefit of the corporate creditors.

CORPORATIONS—SHARES OF STOCK—RIGHTS OF STOCKHOLDER.—A share of stock may be defined as a right which its owner has in the management, profits, and ultimate assets of the corporation. A stockholder in an insurance company has the same rights as a stockholder in any other corporation; but he has no legal title to the property or profits of the corporation until a dividend is declared, or a division made on the dissolution of the corporation.

CORPORATIONS—CAPITAL STOCK—POWER OF DIRECTORS OVER.—The capital stock of a corporation is a trust fund for the benefit and security of the corporate creditors; and the directory or governing body of the corporation are trustees, charged with the duty of guarding the trust fund, and preserving it for the uses for which it was placed in trust. These uses are to meet and discharge the liabilities of the corporation, and to restore to the shareholders, when the corporation is wound up, whatever of the capital stock and accumulated gains may remain on hand after discharging such liabilities.

CORPORATIONS—CAPITAL STOCK—POWER OF DIRECTORS TO INVEST—LIABILITY.—Investment of the stock of a corporation by its directors must be confined within the scope of the corporate powers, and must be done with reference to the interest and success of the corporation. If such stock is misapplied to objects or uses outside the scope of the corporate powers it constitutes a breach of trust, and fastens a personal liability on those who perpetuate the wrong, commensurate with the injury inflicted. Persons receiving stock so misapplied, with notice, make themselves trustees *in invitum* and liable as such to the corporation.

CORPORATIONS—POWER TO SUBSCRIBE TO STOCK OF ANOTHER CORPORATION.—A corporation of any nature cannot, either directly or indirectly,

through its agents, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation.

CORPORATIONS—POWER TO INVEST CAPITAL STOCK IN STOCK OF ANOTHER CORPORATION.—An insurance corporation has no authority to invest its capital stock in the stock of another corporation under statutory power to invest its money “in real or personal property, stocks, or choses in action.”

CORPORATIONS—SUBSCRIPTIONS TO STOCK IN ANOTHER CORPORATION—ULTRA VIRES.—An attempt by the board of directors of a corporation to invest its capital stock in the stock of another corporation is *ultra vires* and void.

CORPORATIONS—INVESTMENT OF STOCK IN ANOTHER CORPORATION—TAXATION.—A corporation, by investing part of its capital stock in the stock of another corporation, is not exempted from taxation against the part so invested on the ground that it is “invested in property which is otherwise taxable,” within the meaning of a statute exempting stock so invested from taxation.

Tompkins & Troy, for the appellants.

Moore & Finley, for the appellees.

³ **STONE, C. J.** The appellant, the Commercial Fire Insurance Company, and the Bank of Montgomery, each of them is a private corporation under the laws of this state. The capital stock of each of these corporations is one hundred thousand dollars. The purpose of the present proceeding, instituted by the insurance company, is to obtain relief from state and county taxes assessed against its capital stock, to the extent of fifty-one thousand dollars of such capital stock, on the following ground: “That said capital is invested as follows: Fifty-one thousand dollars thereof in the capital stock of the Bank of Montgomery, a corporation organized under the general incorporation laws of the state of Alabama, authorized to do a banking business.” The petition then sets up other exemptions claimed, but no question is raised on this appeal as to those other asserted exemptions. We will confine what we have to say to the one item of fifty-one thousand dollars, invested in the capital stock of the Bank of Montgomery.

The petition further avers “that its said capital stock was not worth, on the first day of January, 1890, exceeding the sum of one hundred thousand dollars; that said stock held by it in the Bank of Montgomery was at that time worth par, and has been returned to said tax assessor by said bank for taxation at par. . . . Petitioner claims that it was not bound to return for taxation said capital stock held by it in the Bank of Montgomery, . . . that the same was ³ returned for

taxation by the corporation issuing the same, and it was liable to be taxed, and the taxation thereon charged against the said corporation. And petitioner avers the fact to be that said corporation did return for taxation its capital stock as hereinbefore stated." Petition then averred that the tax assessor had refused to allow a credit to it of the fifty-one thousand dollars of its capital stock so invested in that amount of the capital stock of the Bank of Montgomery.

The petition from which we have copied was filed with the board of revenue of Montgomery county, and by that body disallowed. The contention was then carried by *certiorari* to the circuit court, and again the claim was disallowed. From that judgment the present appeal is prosecuted.

Under our revenue law (Code of 1886, sec. 453) it is provided that "For the use of the state, and to raise revenue therefor, there is levied an annual tax of sixty cents on each hundred dollars in value, upon the following property: . . . 9. The capital stock of all corporations, companies, or associations created or existing under any law in force in this state, except such portions of the capital stock as may be invested in property which is otherwise taxed as property, the same to be paid by the corporation, company, or association; but when such corporation, company, or association pays the taxes in this chapter levied upon the shares into which its capital stock is divided, or the same is paid by the shareholders, such corporation, company, or association shall only be required to pay the taxes levied on the real and personal estate owned by it, unless its investments are otherwise herein taxed." The word "only" appears to be redundant and misplaced in this section. The tax rate has been reduced since the adoption of the code of 1886: See Sess. Acts, 1888-89, pp. 42, 61.

We have a general law in relation to insurance companies, commencing with section 1531 of the code of 1886. Such companies are clothed with large and liberal powers: Code, sec. 1535. Our general banking law is found in the chapter which commences with section 1521 of the code of 1886. The powers of such banks are enumerated in section 1525. It will be seen that the two classes of corporations have very many powers in common. Each is required to have a capital stock subscribed in good faith of not less than fifty thousand dollars, of which not less than twenty-five thousand dollars must be actually paid in by the subscribers

before the filing of the declaration preliminary to incorporation: Code of 1886, secs. 1522, 1532.

⁴ What is capital stock of corporations, and why are they required to have a capital stock paid in?

“Capital stock is the sum fixed by the corporate charter as the amount paid in, or to be paid in by the stockholders, for the prosecution of the business of the corporation, and for the benefit of corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation. . . . At common law the capital stock does not vary, but remains fixed, although the actual property of the corporation may fluctuate widely in value, and may be diminished by losses or increased by gains”: Cook on Stock and Stockholders, sec. 3.

“A stockholder has no legal title to the property or profits of the corporation until a dividend is declared, or a division made on the dissolution of the corporation”: Cook on Stock and Stockholders, sec. 4 a.

“A stockholder in an insurance company has the same rights that a stockholder in any other corporation has”: Cook on Stock and Stockholders, sec. 4 a.

“A share of stock may be defined as a right which its owner has in the management, profits, and ultimate assets of the corporation. By the court of appeals of New York it is said that ‘the right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate according to the amount of stock, in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts’”: Cook on Stock and Stockholders, sec. 5.

In *Neiler v. Kelley*, 69 Pa. St. 403, Justice Sharswood said: “A share of stock is an incorporeal, intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive, in the mean time, such profits as may be made and declared in the shape of dividends.”

Questions have arisen on the liability of stockholders to pay for stock subscribed, the objection being urged that irregularity had intervened in the organization, either accidental, intentional, or fraudulent. In 2 Morse on Banks, section 669, replying to this objection, it is said: “This plea cannot be sustained to the injury either of corporate creditors or of

subsequent *bona fide* purchasers or holders of the stock, who have taken it without participation in or knowledge of any illegality or fraud. . . . It might avail, if the question lay only between the bank and the subscriber; but the corporation in such cases is not regarded as the real or exclusive party in interest. It is rather a trustee for the ⁶ creditors; and they, who are, therefore, the real parties, are certainly not *in delicto*."

"SEC. 671. To the doctrine of trust must be referred the further principle that a subscription for bank stock cannot be diminished after it is once made. So soon as it is legally complete it is an obligation from which even the directors cannot grant the subscriber any absolution, either for the whole or for any part, which will avail him as against persons who were creditors of the corporation prior to the diminution. The directors do not represent these persons, and are authorized to discharge an indebtedness of which they are the real beneficiaries."

"SEC. 672. The doctrine that the stock subscriptions are in the nature of a trust fund for payment of corporate liabilities seems to be well established. From it results the principle that subscribers cannot avail themselves of the statute of limitations in bar of the claims of creditors to have payments made. For the subscribers are chargeable with the trust, and, though the corporation may never have seen fit to enforce it, yet the *cestuis* do not thereby lose their rights": *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894; 2 Morawetz on Private Corporations, secs. 787-789; *Wood v. Dummer*, 3 Mason, 308.

The foregoing quotations are made with a view of presenting clearly and fully the nature and object of capital stock in a corporation. As property it has peculiar attributes. Collectively it is the property of the corporation, while the ownership of the shares is in the shareholders. Sale and disposition of the shares by the several owners is free and untrammelled, save as the law or by-laws of the corporation may have prescribed rules. Not so with the capital stock. That is a security or pledge the law exacts, as a condition on which it grants the corporate franchise, the right to incur liabilities, for the discharge of which no responsibility rests on any natural person. It is the indispensable condition on which the law-making power grants the franchise, because the law and public policy so declare. And the capital stock

is a trust fund; a trust for the benefit and security of the corporation's creditors. The directory or governing body of the corporation are trustees, charged with the duty of guarding the trust fund, and preserving it for the uses for which it was placed in trust. The uses are: 1. To meet and discharge any liabilities and debts of the corporation which disaster may bring upon it; and 2. To restore to the shareholders, when the corporation is wound up, whatever of the capital stock and accumulated gains may remain on hand, after discharging the corporation's liabilities to creditors.

• It is not intended to be affirmed that the governing board of the corporation is required to keep the capital stock unemployed in its locked vaults. It should be utilized with a view of making it productive in some line of investment or operation, within the scope of its corporate powers. There is this limitation to its authorized use. It must be within the scope of the corporate powers, and must be done with reference to the interest and success of the corporation whose capital stock it is. When this is the case there is fidelity in the execution of the trust.

If this trust fund be misapplied to objects or uses outside of the scope of the corporate powers this is a breach of trust, and fastens a personal liability on those who perpetrate the wrong, commensurate with the injury, if any, caused by the misapplication. And persons receiving the trust fund so misapplied, knowing it to be such, make themselves trustees *in invitum*, and render themselves liable to the corporation whose funds are thus misapplied, or to the creditors of the corporation for any diminution the trust fund may suffer in the transaction.

Among the powers conferred on incorporated insurance companies by our statute are the following, embraced in the code of 1886, section 1535, subdivision 7: "To invest their money in real or personal property, stocks or choses in action, and to sell the same; to lend money, discount bills, and secure the payment thereof; to buy and sell exchange, and receive and pay out deposits." These are comprehensive powers. What is meant by the language, "To invest their money in . . . stocks or choses in action, and to sell the same"? Will it, or can it be contended, that the authority to invest in stocks, confers the power to subscribe to the capital stock of another corporation in process of organization? And if it confers the authority to subscribe for and become a stock-

holder in another corporation, in what description of corporation may the insurance company become a stockholder? The statute employs only the generic word "stocks"; and that word, if it include bank shares, applies equally to shares in all private corporations. Can the insurance company invest its capital stock, and thus become a stockholder in any and every description of private corporation, at the mere will and pleasure of its governing body? The vast variety of corporations now in use and operation need not be referred to to show to what extreme results this interpretation would lead. Railroads, telegraph lines, telephones, express companies, mining and manufacturing enterprises, these are only a few of the numerous subjects of incorporation ⁷ under the law. Can an incorporated insurance company under our statute subscribe for stock in the organization of each, all, or any of the numerous corporations now so common in human transactions? The statute has a different meaning.

Stocks—shares in corporations—have come to be in a large degree subjects of commercial dealing and speculation. The newspapers contain tables of the ruling prices of stocks, as their market value fluctuates. These notices refer to the shares of stock in organized corporations. Their sale neither increases nor diminishes the capital stock in the corporation; it neither adds to nor takes from the corporation one dollar of its stock. It simply changes its ownership *pro tanto*. The capital remains in the corporation intact, and the security it furnishes, and is intended to furnish, the creditors of the corporation remains unimpaired.

When we speak of capital stock of a corporation we are understood to refer to the sum subscribed in its organization. When we speak of stock we mean the certificates issued by the corporation to the shareholders, which certificates, like titles to property, furnish the evidence of ownership of the shares of stock. Capital stock is the aggregate of money or other valuable thing contributed or paid into the common treasury, as a condition of the exercise of corporate functions, and a security for their faithful and prudent exercise. It is the property of the corporation charged with a trust, it is true; but, nevertheless, in its possession and under its control. The stock, stocks, or shares of stock do not belong to the corporation. They belong to the shareholders, and are exclusively under the individual control of the several owners. The stocks which the statute authorizes insurance

companies to invest their money in cannot mean capital stock owned and to be held by the corporation. This, we have seen, is a trust fund. It means the stock owned by stockholders, usually evidenced by stock certificates. Stock, as a subject of commercial dealing, is what the legislature meant in the statute we are interpreting. The very connection in which the word is used in the statute confirms this interpretation. "To invest their money in . . . stocks or choses in action, and to sell the same," is the language employed. There is not even a comma between the words "stocks" and "choses in action," nor a shade of difference in the powers conferred as to each. The power to invest in and to sell is very appropriate language when applied to commercial dealings. It is very inapt, if the intention was to confer authority to subscribe for stock in the formation of another corporation.

• The interpretation we have given to the present record, to the effect that the insurance company invested fifty-one thousand dollars of its capital stock in subscribing that amount of it to the capital stock of the Bank of Montgomery when the latter corporation was being formed, is rested on the language of the petition for *certiorari*, which brings this case before us. The correctness of our interpretation is placed beyond controversy by the brief and argument of appellant's counsel. It is there in effect admitted, and attempted to be justified, that when the bank was being organized, the capital stock of the one was invested in the other to the extent of the credit claimed. This, of course, means that to that extent the capital stock of the insurance company became the capital stock of the bank.

Cook on Stock and Stockholders, section 317 and notes, treats of the power of one corporation to subscribe for stock in another. It is there said: "An insurance company has no power or legal right to subscribe for stock in a savings bank and building association, nor to purchase stock in another insurance company." In section 316 the same author said: "A banking corporation has at common law no power to purchase or invest in another corporation, whether that other corporation be itself a bank or of a different business."

In 1 Morawetz on Corporations, sections 431, 432, the right of a private corporation on common-law principles to deal in the stocks of another corporation is discussed, and the lim-

ited extent to which it can so deal is defined. It is not one of the direct grants of power with which it is clothed, but a mere incidental means for conserving some interests which become imperiled. It may accept them as security for the payment of money, and, when necessary, may receive them in payment of a doubtful debt. But this same learned author, in section 433, employs this language: "A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation; nor can it do this indirectly through persons acting as its agents or tools."

In treating this case we must bear in mind the precise question we have in hand. The attempt was being made to collect the taxes off the capital stock of the Commercial Fire Insurance Company; the capital of that corporation, and nothing else: Code, sec. 453, subd. 9. The tax is by statute levied on the capital stock of corporations. In the corporation's petition to be relieved of a part of the tax thus levied it describes it as a tax on the capital stock. It ⁹ avers, "That said capital stock is invested . . . fifty-one thousand dollars thereof in the capital stock of the Bank of Montgomery." The corporation owned its capital stock, and, presumptively at least, did not own the shares of its capital stock. Hence, the propriety and reasonableness of the averment that it was so invested, and not shares in its capital stock, pretermittting, for the sake of argument, its want of corporate power to invest its capital stock. The exact and specific case made in the petition is, that the capital stock of one corporation—the thing itself—is invested in the capital stock of another corporation. And, it may be added, this averment was necessary to give the petition a semblance of merit. Capital stock—the insurance company's capital stock—was the subject of the tax, and in order to maintain the discount or deduction claimed, it was necessary to aver and show that that specific subject of taxation—the capital stock, or some portion of it—had been "invested in property which is otherwise taxed as property." We are thus confronted with the question, Can one and the same sum of money, at one and the same time, serve the purpose of capital stock for two corporations?

We have shown by the highest legal authority that the capital stock of a corporation is a trust fund for the security and benefit of the creditors of the corporation, and that the

managing board fills the relation of trustee for its preservation and administration. Corporations, acting within the scope of corporate powers, fix no liability on their officers, or on any one else. They charge only the corporation. Hence the purpose and policy of requiring a capital stock, as security and indemnity of persons who become its creditors. The law-making power confers on them privileges—a franchise, a right to make contracts in its artificial name without fastening a liability on any natural person—and it exacts from them as a condition on which it grants this franchise—this privilege and power—that they place a capital stock in safe pledge for the security of their creditors. And this capital stock is a permanent investment, with no power in the shareholder to withdraw it, until the corporation is wound up and all its debts paid, and no power in the managing board to permit it to be withdrawn, at the expense of creditors. It is a trust fund in the corporation's treasury, to be used only in its interest, and whatever of profit or emolument it may yield belongs of right to the corporation, its creditors, and shareholders. It must be kept within the corporation and under its control, to meet the purpose for which it was required to be raised and paid in. It is not ¹⁰ materially unlike any other pledge that is placed as a guaranty of faithful performance of debt or duty. It is a fixed pledge until the debt is paid or the duty performed.

Such being the nature, the *status* of capital stock in a corporation, can one and the same fund supply this want and fill this condition for two corporations? The law required one hundred thousand dollars of capital stock, as a condition on which it granted the corporate franchise for that amount of capital to the Commercial Fire Insurance Company, and the same amount from the Bank of Montgomery as the condition on which it conferred a similar franchise on it. Will a single sum of one hundred thousand dollars meet and satisfy this double demand? The law does not grant acts of incorporation in the undoubting faith and trust that they will be profitably and successfully administered. If there was neither distrust nor doubt, no guaranty, no pledge, no capital stock paid in should be required. The law, basing its action on experience, requires this guaranty, this security, because human enterprises often miscarry. Let us suppose that in the case before us disaster should overtake both corporations, and it should become necessary to exhaust the

capital stock of each in the payment of its liabilities. Is it not manifest that the one hundred thousand dollars the law required as a pledge and guaranty from each company would not be forthcoming? Fifty-one thousand dollars of the sum could not meet the double demand of that sum from the respective creditors of the two companies. One dollar cannot pay two.

Let us take a further step. If corporation No. 1 can, of its one hundred thousand dollars of capital stock, supply fifty-one of the hundred thousand dollars the law requires of corporation No. 2, and yet retain its one hundred thousand dollars of stock, no sound argument can be formulated why it could not furnish the bank with the whole hundred thousand dollars of capital with the same result. And if corporation No. 1 can, from its own capital, furnish the capital stock of corporation No. 2, why cannot corporation No. 2 render the same service to corporation No. 3? And why cannot this process be carried on indefinitely? Would not such proceedings be an utter subversion of the purpose and policy which require that corporations, as a condition of the franchise they ask to be clothed with, shall furnish this security for those with whom they propose to have dealings? These questions can receive but one answer, and that answer is, that corporations have no authority to subscribe their ¹¹ own capital stock in the capital stock of another corporation in process of organization.

The claim set up by appellant in this case, as we have shown, is rested on the statutory authority given to insurance companies "to invest their money in real and personal property, stocks, or choses in action, and to sell the same." This is the entire authority conferred; and, as we have shown, the power to subscribe for shares, and thus aid in the formation of another corporation, is not among the general, incidental, or implied powers a corporation is clothed with. Unless such power is expressly granted it does not exist. The governing body of a corporation does not act for itself, but for another—the corporation. The corporation is the principal, the governing board the agent. In the matter we have in hand the power of such governing board is not distinguishable, on any sound legal principle, from that of an agent, or attorney in fact, constituted by private appointment. Neither can do acts binding on the principal beyond the scope of the power conferred; and the rule and principle for

admeasuring the power of each must of necessity be the same. Now, let us suppose that A, a private person, by power of attorney, constitutes B his agent and attorney in fact, with power "to invest his (the principal's) money in real and personal property, stocks, and choses in action, and to sell the same." Let us suppose, further, that under this power B should attempt to invest A's money in subscribing for shares in a projected, unorganized corporation. Would any one contend that the power of attorney had given him authority to do so? Most assuredly not.

When the attempt was made to invest the insurance company's capital stock in the bank's capital stock the governing board did an act which was *ultra vires*. Failing to bind the corporation, did not the act, like all such attempts by trustees, simply bind the members of the board personally? They could not thereby invest the capital stock of the insurance company, for that was a trust fund. They were without power or authority to so invest it. And if, in the fluctuations of trade, it shall become necessary to resort to the capital stock of that company to meet its liabilities, could the plea that it had been invested in the capital stock of another corporation avail any thing? To render such defense available, should not the attempted investment be such as the corporate authorities were authorized to make? "Capital stock does not vary, but remains fixed. . . . The directors do not represent these persons [the creditors ¹² of the corporation], and are not authorized to discharge an indebtedness of which they [the creditors] are the real beneficiaries." Each corporation being organized on the basis of one hundred thousand dollars of capital stock, should a crisis arise which calls for that stock, would not the governing board be required to account for it and produce it, unless they can show it has been invested in something else, in which their corporate powers authorized them to invest it?

Not having invested the money in any thing they were authorized to invest it in, is it not the sentence of the law that they made no investment whatever? And if the money is not found in the vault of the corporation, are not the directors personally liable for it? The law and public policy estop each corporation from denying it has a separate capital stock of one hundred thousand dollars, unless it is shown that all, or some portion of it, has been "invested in property which

is otherwise taxed as property," and that such investment was within the scope of its corporate power.

It follows that the insurance company is not entitled to the credit claimed.

Affirmed.

MCCLELLAN, J., and WALKER, J., dissented.

CORPORATIONS—CAPITAL STOCK AS TRUST FUND.—The capital stock of a corporation constitutes, as between creditors and stockholders, a trust fund for the payment of the debts: *Missouri etc. Smelting Co. v. Reinhard*, 114 Mo. 218; 35 Am. St. Rep. 746, and note; and the directors are the trustees for that purpose: *Commercial Nat. Bank v. Burch*, 141 Ill. 519; 33 Am. St. Rep. 331, and note. See, also, *Corey v. Wadsworth*, 99 Ala. 68; post, p. 29.

CORPORATIONS—POWER TO INVEST IN STOCK OF ANOTHER CORPORATION. A banking or other corporation has no power to purchase stock in an insurance or other corporation, unless expressly authorized by statute: *Bank v. Hart*, 37 Neb. 197; 40 Am. St. Rep. 479; *Denny Hotel Co. v. Schram*, 6 Wash. 134; 36 Am. St. Rep. 130, and extended note.

COREY v. WADSWORTH.

[99 ALABAMA, 68.]

CORPORATIONS—CAPITAL STOCK AS TRUST FUND—POWER OF DIRECTORS OVER.—The governing body of a corporation holds its capital stock in trust to be preserved and administered primarily for the benefit of creditors, and secondarily for the benefit of the stockholders.

CORPORATIONS—INSOLVENCY—PREFERENCES IN FAVOR OF OFFICERS OR DIRECTORS.—A member of the governing body of an insolvent corporation of which he is an unsecured creditor cannot be made a preferred creditor in the administration or disposition of the corporate assets, but such assets must be distributed *pro rata* among all the unsecured creditors, unless valid liens have been created in favor of such member, and then supervening insolvency cannot destroy or impair them.

CORPORATIONS—INSOLVENCY—DIRECTORS AS TRUSTEES—RIGHT TO PREFER THEMSELVES.—The directors and officers of an insolvent corporation are trustees for its creditors, and must manage its property and assets with strict regard to their interests; and if they are themselves creditors, while the insolvent corporation is under their management, they cannot secure to themselves any preference or advantage over other creditors, but must share *pro rata* with them.

CORPORATIONS—WHEN INSOLVENT.—A corporation is insolvent when its assets are insufficient for the payment of its debts and it has ceased to do business, or has taken, or is in the act of taking, a step which practically incapacitates it from conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue.

Brickell, Harris & Eyster, for the appellant.

E. W. Godbey, for the appellee.

⁷¹ STONE, C. J. The present case is an appeal from an interlocutory order of the city court, sitting in equity, by which Corey's demurrer to Wadsworth's bill was overruled. The case presents a question of very grave importance to the commercial world.

The substantial facts of the case made by the bill are as follows: At a time anterior to the latter part of the year 1887, "The Decatur Building Supply Company" was incorporated under the general laws of Alabama, Decatur being the place of its business habitation. Wadsworth, the complainant, at various times between the latter part of the year 1887 and May 19, 1888, sold and shipped to the Decatur Building Supply Company lumber and shingles, and at various dates drew on the corporation for payment at ninety and one hundred and twenty days. The several drafts were accepted, but have not been paid. The aggregate sum of the several accepted drafts is fourteen hundred dollars, all of which was long past due when this bill was filed in January, 1891. The bill then ⁷² charges that Lorenzo Corey, one of the defendants, became a stockholder in said Decatur Building Supply Company "in the early part of February, 1888, and thereafter he became a member of the board of directors and president of said company, which position he held at the time of the occurrence of the matters and transactions hereinafter complained of, and has never resigned or been removed therefrom; and that at the time he so became connected with the said Decatur Building Supply Company the same was prosperous and in a solvent condition." The bill then avers that about the 15th of May, 1888, the said Corey, together with others, officers and stockholders of said corporation, entered into an agreement with the Exchange Bank by which they bound themselves as sureties, or guarantors of said Decatur Building Supply Company, for the payment to the bank of such indebtedness as the building supply company might incur, not exceeding six thousand dollars. It was then charged that before the end of June, 1888, it was "pretended" that the bank had lent to the building supply company said sum of six thousand dollars, and had taken its notes therefor, due at sixty and ninety days.

The remaining charges of the bill material to the case in

band may be summarized as follows: One Hoy, brother-in-law of Corey, was general manager of the building supply company, and was its vice-president. From the 19th to 23d of July, 1888, said company, through Corey and Hoy, sold—"pretended to make sale of"—a large part of its stock in trade to Corey, in consideration that he would and did assume to pay and pay the said debt of six thousand dollars to the Exchange Bank, of which Corey and other officers and stockholders of the building supply company had become guarantors. The said debt was presently paid by Corey, and he took possession of the stock in trade so purchased, and removed it to a building of his own. This was done long before the maturity of the debt to the bank, of which Corey and other officers of the supply company were guarantors. The bill then charges that, "At the time of the aforesaid pretended purchase by Corey of Decatur Building Supply Company, it (the corporation) was hopelessly insolvent, its liabilities due and past due being greater by far than its assets; and within three or four days after the consummation of the transfer to Corey, on, to wit, the twenty-sixth day of July, 1888, the said Decatur Building Supply Company, acting through said Corey as its president, assigned all its remaining assets to a trustee for the benefit of its general creditors, whose just claims and demands against said company ⁷² amounted to more than twenty-two thousand dollars; to pay which property was assigned of value not sufficient to pay more than fifteen per cent." Corey and the Decatur Building Supply Company are made defendants to the bill.

Before the demurrer was filed to the bill it was amended, so as to make it a "bill in behalf of complainant and all other creditors of the building supply company, who may come in and make themselves parties complainant hereto, and assume their proportionate share of the costs." Under this amendment, S. Truscott came in by petition, and united in the prayer for relief.

The bill, in a general way, charges that Corey took over-pay in the matter of the guaranty for which he with others was bound. It also charges that the money advanced or paid by the bank "was paid, not to the Decatur Building Supply Company, but to the officers making the guaranty of the loan, for their own emolument." These questions need no extended mention here. If the supply company did not

get the benefit of the money advanced by the bank, of course it was under no obligation to indemnify the guarantors of the loan; and, in taking pay from the supply company on that account, Corey misappropriated the assets, and rendered himself liable to the creditors of the insolvent corporation to the extent of the misappropriation. So, if he overpaid himself for the liability he was under as guarantor to the bank, the same rule will apply to the excess. It is against the policy of the law to permit the president, or any director of a corporation, to realize a personal profit, or side speculation, in any dealing he may have with the corporation: 1 Waterman on Corporations, sec. 163. These matters, however, are not present in argument, and we will not consider them further.

The question for our consideration, briefly stated, is this: Can a member of the governing body of an insolvent corporation, of which corporation he is a nonsecured creditor, be made a preferred creditor in the administration or disposition of the corporate assets; or must the assets be distributed *pro rata* among all the nonsecured creditors? Of course, if valid liens have been created, supervening insolvency cannot destroy or impair them. The question in this case has been industriously and ably argued on both sides.

It is the settled law of this state that a debtor—a natural person—though insolvent, may of his effects, whether money or property, pay one or more creditors in full, although he thereby disables himself to pay his other debts. There are conditions or limitations to this right. The paying debtor⁷⁴ must not by the transaction secure any benefit to himself, other than the discharge of the obligation he rested under to pay the debt. If paid in property, it must be at its reasonable fair market value. If the property be in value so much in excess of the debt paid with it as to necessitate a substantial payment to the insolvent debtor therefor, and such substantial excess is so paid, this is treated as securing a benefit to the debtor, by enabling him to shuffle such excess out of the reach of his other creditors; and the transaction is fraudulent. If the preference of one or more creditors by an insolvent debtor can withstand these tests the motive or purpose of the debtor in giving the preference becomes an immaterial inquiry: 3 Brickell's Digest, 517, secs. 137, 138; *Hodges v. Coleman*, 76 Ala. 103; *Meyer v. Sulzbacher*, 76 Ala.

120; *Shealy v. Edwards*, 78 Ala. 176; *Levy v. Williams*, 79 Ala. 171; *Leinkauff v. Frenkle*, 80 Ala. 136; *Tryon v. Flournoy*, 80 Ala. 321; *Montgomery v. Bayliss*, 96 Ala. 342; *Ellison v. Moses*, 95 Ala. 221; *Tiffany v. Boatman's Inst.*, 18 Wall. 375; *Grant v. National Bank*, 97 U. S. 80.

There are many authorities which hold that a solvent and going corporation can secure a member of the governing board in the payment of a debt due him; and the fact that the corporation becomes insolvent afterwards does not impair the validity of his security. We are not inclined to question the correctness of this principle; but we will explain hereafter more fully what we mean by a solvent corporation: *O'Connor etc. Co. v. Coosa Furnace Co.*, 95 Ala. 614; 36 Am. St. Rep. 251; *Lexington etc. Ins. Co. v. Page*, 17 B. Mon. 412; 66 Am. Dec. 165; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Paulding v. Chrome Steel Co.*, 94 N. Y. 334; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587.

There are some authorities which hold that an insolvent corporation may make an assignment, preferring even its own directors, or members of its governing body, if they be creditors of the corporation. That the directors have the same rights as creditors of natural persons have, and that the relation they sustain to the corporation and to its assets does not impair that right, if in fact their claims be *bona fide* debts of the corporation: *Whitwell v. Warner*, 20 Vt. 425; *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461; *Planters' Bank v. Whittle*, 78 Va. 737; *Burr v. McDonald*, 3 Gratt. 215.

The governing body or directory of a corporation holds the capital stock of a corporation in the confidence that it will be preserved and administered, primarily for the benefit of creditors, and secondarily for the benefit of the stockholders: ⁷⁵ *Commercial Fire Ins. Co. v. Board of Revenue*, 99 Ala. 1; *ante*, p. 17; *Friend v. Powers*, 93 Ala. 114. As long ago as 1824, Justice Story, in *Wood v. Dummer*, 3 Mason, 308, said: "It appears to me very clear upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank." In *Bank of St. Mary's v. St. John*, 25 Ala. 566-612, this court, in 1854, used this language: "The capital stock of the bank, with all its property and assets, is to be regarded as a trust fund for the payment of creditors; and the stockholders,

directors, and agents of the bank are trustees for their benefit, and as such may be made to discover and account in chancery." So in *Bradley v. Farwell*, 1 Holmes, 433, the court said: "The relation between the directors of a corporation and its stockholders is that of trustee and *cestui que trust*": See Wait on Corporations, 507, note 1, and citations; *Elyton Land Co. v. Birmingham Warehouse Co.*, 92 Ala. 407; 25 Am. St. Rep. 65.

In *Smith v. St. Louis Mutual Life Ins. Co.*, 3 Tenn. Ch. 502, that able chancellor, Cooper, said: "Nor is it denied that our decisions have settled that the assets of an insolvent corporation constitute, under our laws, a trust fund for the payment of creditors of the corporation, in the order or priority fixed by law, and, if there be no priority, then *pro rata*, and that no amount of diligence on the part of one or more of the creditors can defeat the right of others to such distribution. . . . The object is, in certain contingencies, to prevent unseemly scrambles, and to secure, what equity delights in, equality of rights among all who are equally meritorious."

We have cited authorities which affirm the right of a director of an insolvent corporation to have himself made a preferred creditor in a case such as we have in hand. There are authorities the other way. In 2 Morawetz on Corporations, section 787, it is said: "The equitable interests of the shareholders and creditors are altered by the insolvency; and the directors or managing agents, who originally stood in the fiduciary relation to the company, become placed in a fiduciary relation to its creditors. The powers of management vested in the directors of an insolvent corporation, which has ceased to carry on business, are solely powers to manage the assets in trust for its creditors and for their benefit. It has been held, therefore, that the directors of an insolvent corporation are bound to manage the remaining assets with strict regard for the interests of its creditors. . . . Directors of an insolvent corporation who have claims ⁷⁶ against the company as creditors must share ratably with the other creditors in a distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors, by using their powers as directors for that purpose. These powers are held by them in trust for all the creditors, and cannot be used for their own benefit."

In *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263, the head note expresses the principle decided in the following

language: "Directors and managers of insolvent corporations are trustees of the funds, as well for the creditors as for the corporation, and are bound to apply them *pro rata*, and cannot use them to exonerate themselves to the injury of other creditors."

In the case of *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, the court decided that "the directors and officers of an insolvent corporation are trustees for the creditors, and must manage its property and assets with strict regard to their interests; and, if they are themselves creditors, while the insolvent corporation is under their management, they cannot secure to themselves any preference or advantage over other creditors."

In *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443, 8 Am. St. Rep. 88, it was held that "directors of corporations are trustees for the corporation, and within the rule that one holding a fiduciary relation to trust property cannot, either directly or indirectly, become the purchaser of such property, or transfer it to his own use or for his own benefit, and, if he does, the sale or transfer is voidable, and will be set aside at the mere pleasure of the beneficiaries, though such fiduciary may have paid full price and gained no advantage."

In *Beach v. Miller*, 130 Ill. 162, 17 Am. St. Rep. 291, it was said: "The directors of an insolvent corporation are trustees of its assets for its creditors, and cannot give the funds away, or sell them at a sacrifice in the interest of others, even with the consent of the stockholders; and if themselves creditors, they cannot receive any advantage or preference in the payment of their claims at the expense of the other creditors." To the same effect, and by the same court, is the case of *Roseboom v. Whittaker*, 132 Ill. 81.

In *Olney v. Conanicut Land Co.*, 16 R. I. 597, 27 Am. St. Rep. 767, it was held that "the directors of an insolvent corporation are trustees for the creditors of the corporation, and they cannot obtain priority over a creditor by taking mortgages to themselves to secure them for advances, and for their indorsement " of the notes of the corporation, after the creditor has brought suit, and when the company is insolvent."

In *Howe v. Sanford etc. Co.*, 44 Fed. Rep. 231, it was decided that "where a corporation, while still a going concern, is insolvent, a mortgage on its property, executed to secure the directors, who are liable as indorsers for it to a large

amount, is invalid as to general creditors, and that though the mortgage was procured by the directors without any actual fraudulent intent."

In *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7, the "directors of an embarrassed corporation, holding claims against it which they wished to protect, had the notes of the company payable to themselves drawn and antedated, and procured them to be discounted by defendant bank. They then caused to be executed a deed of trust conveying all the assets of the company as security for these notes, among others. Held, in a proceeding by unsecured creditors to set it aside, that, being a security for debts upon which the directors were themselves liable as indorsers, it was in effect a preference to themselves, and fraudulent and void."

In 23 *American Law Review*, No. 6, page 1009, there is a strong article maintaining the same doctrine announced in the cases cited above, with a reference to many adjudged cases: See, also, *Jackson v. Ludeling*, 21 Wall. 616; *Dabney v. Bank of State of South Carolina*, 3 S. C. 124; *Drury v. Cross*, 7 Wall. 299; *Thorington v. Gould*, 59 Ala. 461; *Goodwin v. McGehee*, 15 Ala. 232.

The question we have been considering is one of grave and growing importance in this state, and we have, therefore, felt it our duty to collate the authorities. It will be seen that the modern authorities, almost without exception, utter the same strong condemnatory language of any and all attempts by directors of an insolvent corporation to have themselves indemnified and preferred over the other creditors of the company. The assets are, in a sense, a trust fund in their hands for the payment of the corporation's debts, and it is both their moral and legal duty to maintain perfect equality in their administration and disbursement; at least to the extent that they cannot prefer themselves. We need go no farther in this case.

In looking into the authorities it will be seen that the right of the directors of an insolvent corporation to prefer themselves as creditors is withheld from them, not alone on the ground that the assets are a trust fund, of which they are trustees for the creditors. Notice is taken of the superior knowledge they necessarily have, and the great advantage this would and does give them in a race of diligence. But the principle extends farther. In a conveyance by which

they attempt to pay or secure themselves, that necessary element of all valid contracts—opposing interest in the seller and buyer—is wanting. They are both seller and buyer. Such transactions by a trustee are always voidable, on the ground of public policy.

At what stage of a corporation's affairs must it be pronounced insolvent, so as to bring it within the principle we have declared? It is not enough that its assets are insufficient to meet all its liabilities, if it be still prosecuting its line of business, with the prospect and expectation of continuing to do so; in other words, if it be, in good faith, what is sometimes called a going business or establishment. Many successful corporate enterprises, it is believed, have passed through crises, when their property and effects, if brought to present sale, would not have discharged all their liabilities in full. We feel safe in declaring that when a corporation's assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue, then such corporation must be pronounced insolvent.

Under the definition we have given, we hold that the sale charged in the bill to have been made by the Decatur Building Supply Company to Corey was, if the averments be true, an attempted preference by an insolvent corporation of a member of its governing board, and that he is chargeable as a trustee with the property and effects so received, or their value, for the equal benefit of all the creditors.

The question we have been considering may possibly have been remotely touched in the case of *Globe Iron etc. Co. v. Thacher*, 87 Ala. 458. To the extent of the conflict, if there be such, the present opinion must prevail.

The decretal order of the chancellor, overruling the demurrer to the bill, must be affirmed.

McCLELLAN, J., dissented.

CORPORATIONS.—CAPITAL STOCK AS TRUST FUND: See *Commercial etc. Ins. Co. v. Board of Revenue*, 99 Ala. 1; *ante*, p. 17, and note.

CORPORATIONS—INSOLVENCY—PREFERENCES IN FAVOR OF OFFICERS.—The directors of an insolvent corporation are trustees for its creditors, and are therefore debarred in equity, by virtue of their positions, from preferring

debts due themselves from the corporation: *Olney v. Conanicut Land Co.*, 16 R. I. 597; 27 Am. St. Rep. 767, and note; *Hill v. Pioneer Lumber Co.*, 113 N. C. 173; 37 Am. St. Rep. 621; *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291, and extended note. See, also, the extended note to *Garrett v. Burlington Plow Co.*, 59 Am. Rep. 466.

COMMERCIAL BANK OF SELMA v. HURT.

[99 ALABAMA, 130.]

FACTORS—AUTHORITY TO PLEDGE GOODS.—In the absence of express statute a factor or commission merchant has no implied authority to pledge the goods of his principal for his own use. A party so taking the goods and advancing his money acquires no right to the property as against the principal whether he knew he was dealing with a factor or not.

WAREHOUSE RECEIPTS—NEGOTIABILITY.—A statute providing that “a receipt of a warehouseman on which the words ‘not negotiable’ are not plainly written or stamped may be transferred by the indorsement thereof, and any person to whom the same is transferred must be deemed and taken to be the owner of the things and property therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person,” makes such receipts negotiable only in the sense that their regular transfer by indorsement amounts to a manual delivery of the property named in them, but they are not warranties or guaranties of title by the party issuing them.

WAREHOUSE RECEIPTS.—UNAUTHORIZED PLEDGE by a factor or agent to sell of a warehouse receipt for the property of his principal is ineffectual to divest the title of the latter, who may recover the property from the pledgee.

WAREHOUSE RECEIPTS—UNAUTHORIZED PLEDGE—LIMITATION IN CONTRACT OF PLEDGE.—When a factor or agent to sell pledges the property of his principal or the warehouse receipts therefor without authority a clause in the contract of pledge that the property “has been advanced upon by us to its full value” limits the operation of the pledge to the factor’s actual interest in the property, but does not divest the title of the real owner as against the pledgee.

Dawson & Pitts, for the appellant.

G. A. Robbins and J. H. Stewart, for the appellee.

133 WALKER, J. The claim of the appellant, the Commercial Bank of Selma, to the cotton involved in this suit rests upon a transfer and delivery by the H. C. Keeble Company ¹³⁴ of warehouse receipts therefor, as collateral security for a note made by that company to the bank. The H. C. Keeble Company was a corporation engaged in business as a cotton factor and grocery merchant in the city of Selma. The appellee, who was the owner of the cotton, had had it shipped to that company, with instructions not to sell it until

ordered to do so. The consignee had the cotton stored in the warehouse of Phillips & Parrish, and took the warehouse receipts therefor in its own name. No advances were made to the appellee on this cotton, and there is no evidence that he authorized the consignee to store it and take the warehouse receipts in its own name, or to pledge the cotton itself, or the warehouse receipts.

Under the common law a factor or commission merchant has no implied authority to pledge the goods of his principal for his own use. Unless the result is controlled by some statute the attempted pledge does not work a divestiture of the title of the principal, and the party receiving such a pledge and advancing his money acquires no right to the property as against the principal, whether he knew he was dealing with a factor or not: *Bott v. McCoy*, 20 Ala. 578; 56 Am. Dec. 223; *Voss v. Robertson*, 46 Ala. 483; *Allen v. St. Louis Bank*, 120 U. S. 20; 1 Lawson's Rights, Remedies and Practice, sec. 229.

In England and in several of the states in this country statutes have been enacted for the protection of third persons who, in good faith and in ignorance of any defects of title, advance money or incur obligations on the faith of property which is apparently owned by the persons with whom they deal, who, however, in fact hold it merely as factors or agents, having been intrusted by the owners with possession of the property or of documentary evidence of title to it: *Soltau v. Gerdau*, 119 N. Y. 380; 16 Am. St. Rep. 843; *Howland v. Woodruff*, 60 N. Y. 73; *Price v. Wisconsin etc. Ins. Co.*, 43 Wis. 267; *Macky v. Dillinger*, 73 Pa. St. 85; *George v. Fourth Nat. Bank*, 41 Fed. Rep. 257. Decisions controlled by such statutes have no bearing upon this case, as we have no statute purporting to change the common-law rule which protects the owner against an unauthorized pledge of his property by one who, as factor or agent to sell, has been intrusted with the possession and custody of it. No statute is appealed to which could give any color to a claim that an unauthorized pledge by a factor of the property itself which was intrusted to him would have any other ¹²⁵ effect as against the principal than was accorded to such a transaction by the common law.

If the H. C. Keeble Company, instead of having the cotton stored in the warehouse of Phillips & Parrish, had retained possession of it until, without any authority or license from the appellee, the cotton itself was delivered to the bank in

pledge to secure the payment of the note of the H. C. Keeble Company, it is plain that the bank would not have acquired any greater title to the property than that company had to confer; and the appellee would have been entitled to recover the cotton from the bank, or to hold the bank liable for its conversion. But it is claimed that the factor, having stored the cotton in a warehouse and obtained warehouse receipts therefor to itself, was enabled by the transfer of those receipts to confer upon the bank a claim to the cotton which must prevail against the title of the true owner. Section 1178 of the code is relied upon as giving this effect to the transfer of warehouse receipts by the persons to whom they are issued. The clause of that section upon which this claim is based is in the following words: "The receipt of a warehouseman, on which the words 'not negotiable' are not plainly written or stamped, may be transferred by the indorsement thereof, and any person to whom the same is transferred must be deemed and taken to be the owner of the things or property therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person."

Sections 1175, 1177, 1178, and 1179 of the code are based upon an act approved February 28, 1881, entitled "An act to prevent the issue of false receipts, and to punish the fraudulent transfer of property by warehousemen, wharfingers, and others": Acts of 1880-81, p. 133. In the process of codification the provisions of that statute were redrafted and somewhat modified. But the provisions of the four sections above mentioned are all in furtherance of the main legislative purpose which was indicated in the title, and in the corresponding section of the original act. So far as warehouse receipts are concerned the purpose of the statute is, in the first place, to prevent the issue of such receipts, unless the property therein described has been actually received, and is in the possession of the person issuing the receipt. This purpose is manifested in section 1175 of the code. The purpose, in the next place, is to give definite legal recognition to such receipts as true tokens of the possession of the property described in them; and to regulate the manner in which the holder of such a token of possession ¹²⁶ may, by an assignment of it, convey his interest in the property described as effectually as he could by a transfer and delivery of the property itself. The provisions to this end are embodied in sections 1177, 1178, and 1179. Undoubtedly, it was the

intention of the legislature to facilitate and throw safeguards around dealings in personal property by the use of paper representatives of it. To this end the holder of a warehouse receipt is so far treated as the possessor of the property mentioned in it that his transfer of the receipt, in the mode prescribed by the statute, operates in the same manner as the direct delivery of the property itself would do. The transfer of the receipt is given effect as a symbolical delivery of possession. The statute does not undertake to make the receipt better evidence of title than the actual possession of the property itself. We cannot conceive that it could have been within the contemplation of the legislature that the provisions of the statute would enable a thief, by depositing the stolen property with a warehouseman and obtaining a receipt for it in due form, to confer upon an innocent purchaser, for value and in good faith, a claim to the property which would prevail against that of the true owner.

In *Collins v. Ralli*, 20 Hun, 246, it was held that a New York statute, substantially identical with the provision above quoted, did not protect the purchasers for value and in good faith of warehouse receipts, when the possession of the cotton they represented by the person to whom they were issued had been larcenous. After quoting the statute the court said: "The learned counsel for the defendants insist that the provisions of this section afford them complete protection against a recovery in this action; that having purchased the cotton upon the faith of the negotiable warehouse receipts, and paid therefor full market value, this case falls within the spirit and the letter of the section. All the other sections of this act, except the last, which is unimportant, prohibit the issue of false receipts, etc., and prescribe the penalty for a violation of their provisions. The scope and object of the act, therefore, seems to be to protect the mercantile community against fraudulent practices by warehousemen, wharfingers, and others, in respect to these receipts for goods stored, or represented to be stored with them. That this is the purpose is shown by the title of the act. . . . The clause 'warehouse receipts given for any goods . . . stored or deposited with any warehouseman,' means receipts given for goods so stored or deposited by any person having the title thereto, real or apparent, or authority of ¹²⁷ such person therefor. This section of the act proceeds upon the assumption that the receipt is so issued. Any other construction

would enable warehousemen to issue receipts for goods known by them to be stolen, and so convey title to them, or even themselves to commit larceny, and by issuing receipts for the stolen property defraud the plundered owner of all title to and power of reclaiming it. Such a construction would work a change in the law hardly contemplated by the legislature when the act under consideration was passed, and yet the construction insisted upon by the defendants would accomplish precisely this result. Courts often have to look beyond the mere words of a statute in determining its meaning, and give to it such an interpretation as the mischief sought to be cured, and the evident intention of the legislature indicate." The judgment in that case was affirmed by the court of appeals: *Collins v. Ralli*, 85 N. Y. 637; and the decision has been approved in subsequent cases: *Hentz v. Miller*, 94 N. Y. 64; *Soltau v. Gerdau*, 119 N. Y. 380; 16 Am. St. Rep. 843.

To put it in the power of a factor to give effect to an unauthorized pledge of the property of his principal by resorting to the device of pledging a receipt for the property, instead of the property itself, would as clearly be an abridgement of the common-law rights of the owner as it would be to allow a thief, by using a receipt for the stolen property, instead of the property itself, to defeat the common-law right of the owner to reclaim the stolen property, in whosoever hands it may be found. The statute under consideration does not purport to deal with the right of the owner of personal property to recover it from the one who claims under a disposition of it, which was unauthorized by the owner. The object in view being to recognize dealings in personal property by the use of certain tokens of its possession, to prevent the issue of such tokens except when the property mentioned in them has actually been received by the persons issuing them, and to regulate the transfer of the property by assignment of the token, as a substitute for actual delivery of the property; the statute was framed on the assumption that the possession of the property by the person to whom the token was issued was accompanied by ownership, and a right to dispose of it, and questions presented by the assertion of a paramount claim to the property were not dealt with by the statute, but were left to be determined by existing laws governing the right of the true owner of property to follow and reclaim it in the hands of persons claiming under an unau-

thorized ¹²³ disposition of it by one not the true owner, but in actual possession of it.

There is evidence in section 1178 of the code of the absence of any intention to enable the holder of a warehouse receipt, by a transfer of it by indorsement, to confer any better claim to the property than he could if he had not stored the property with a warehouseman, but had invested the person with whom he dealt with actual possession of it. Immediately after the clause already quoted from that section is the following provision: "But this section must not be so construed as to affect or impair the lien of a landlord on such things, or property for rent or advances, or to affect or impair any lien thereon created by contract, of which notice is given by registration in the manner prescribed by law." It is not to be supposed that the legislature was more solicitous to protect the rights of lienholders than those of the owners of the property. The assumption is that it is the owner who has had the property stored, and obtained a warehouse receipt for it; and the provision just quoted simply makes it plain that he cannot, by a transfer of the receipt, any more than he could by a disposition of the property, accompanied by an actual delivery of possession, affect or impair liens upon it. It is further provided in the same section that, "in the event of the loss or destruction of such receipt, the warehouseman, not having notice of the transfer thereof by indorsement, may make delivery of the things or property to the rightful owner thereof; and if the things or property, or any part thereof, be claimed or taken from the custody or possession of the warehouseman under legal process, the surrender thereof may be made without delivery or cancellation of such receipt, or without indorsement thereon." The first of these two clauses shows that it was assumed that the receipt was issued to the rightful owner of the property. The second of them shows that it was no part of the legislative intention to make the fact that his receipt is outstanding a protection to the warehouseman against paramount claims to the property; or to displace, in the case of the issue of a warehouse receipt to another, the common-law rules governing the rights of the owner to recover his property from a stranger claiming under a disposition of it not binding on him. The apparent object of the statutory provisions in reference to warehouse receipts is to give them, for the purposes of commerce,

recognition and credit as substitutes for the property described in them, and to give dealings in them the same effect as similar dealings with the property itself. We think that¹³⁹ they are made negotiable only in the sense that in their passage through the channels of commerce the law regards the property which they describe as following them, and gives to their regular transfer by indorsement the effect of a manual delivery of the things specified in them. No intention is disclosed to give dealings in them any more controlling effect upon the title to the property they represent than would be given to similar dealings with the property itself. At last, they are mere tokens of possession, and not guaranties of title by the persons issuing them. The warehouseman holds himself out as the custodian, for the legal holder of the receipt, of the property mentioned in it, but he does not warrant the title of the property against the claims of strangers to the contract of storage.

This view of the statute is well supported by pertinent authorities. By the express terms of the statute which was under consideration in the case of *Insurance Co. v. Kiger*, 103 U. S. 352, the unauthorized pledge by a factor of a warehouse receipt for the property of his principal was ineffectual as against the principal. On that ground the owner of the property in that case was held to be entitled to recover it, the adverse claim being under a pledge by the factor of warehouse receipts for it. But, in overruling the claim of the pledgee against the warehouseman, based upon the provisions of the statute declaring warehouse receipts issued under it negotiable by indorsement, and making the warehouseman liable to the legal holder or owner of the receipt, for the market value of the property therein described, the court said: "There is no pretense of fraud or collusion, and we think it would be a surprise to warehousemen to be told that when they issued their receipts for property in store, they became not only responsible as custodians of the property, but guarantors of its title to the assignees of the receipts. Such a rule would make it necessary for a warehouseman, before giving a receipt, not only to ascertain whether he had the property actually in store, but whether the title of the bailor was valid and unencumbered. Certainly this could not have been in contemplation when warehouse receipts were made by statute negotiable, and to some extent evidence of ownership." In the course of the opinion, these expressions were used: "Un-

doubtedly the possession of the receipts was equivalent to the possession of the property." "The receipt in the hands of the company represented the cotton stored by Aiken & Watt, and gave the company the same rights it would have had if the cotton instead of the receipt had been handed over. 140 The company got by the receipt such interest in the cotton as Aiken & Watt could by their pledge convey, and that is all Boyd & Co. agreed to deliver on the return of their receipt by the lawful holder."

In noticing a Missouri statute, almost identical in its title and provisions with the original act on which the sections of the code under consideration were based, it was said in *Allen v. St. Louis Bank*, 120 U. S. 20-35: "None of these provisions are limited or even addressed to factors or other agents authorized to sell goods of their principals, and intrusted for that purpose with the possession either of the goods, or of warehouse receipts, bills of lading, or other similar documents in which such agents are named as consignees. But their leading object is to regulate the manner and effect of transferring warehouse receipts and bills of lading by indorsement." The meaning of the later statute which was relied on in that case was not determined by the court, except to the extent of the decision that the pledgee of the warehouse receipts, without their indorsement in writing, was not entitled to its protection.

As representatives of property, bills of lading and warehouse receipts are instruments of similar character. They are dealt with as substitutes for the property itself. The assignment of a bill of lading for value while the goods are in transit is limited to the effect of symbolizing their sale and delivery, and the assignee is thereby invested with all the rights of a purchaser with actual delivery of possession, but no more: *Douglas v. People's Bank of Kentucky*, 86 Ky. 176; 9 Am. St. Rep. 276; *Moore v. Robinson*, 62 Ala. 537. In *Shaw v. Railroad Co.*, 101 U. S. 557, it was recognized that a statute declaring that bills of lading "shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes," should not, in the absence of language clearly evidencing such an intention, be construed as effecting such an innovation upon the common-law right of the owner of property to protection against its misappropriation by others, that such misappropriation could be successfully made by the use of a symbol or

representative of the property, when it would not prevail against the claim of the owner if the possession of the property itself had been acquired in a similar manner. In *National Bank v. Wisconsin Cent. R. R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566, the proposition was stated and applied that it is always a good defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its ¹⁴¹ possession by one having a paramount title; and it was decided that the correctness of this proposition was not affected by a statute which provided that bills of lading, or receipts for any goods, wares, merchandise, etc., when in transit by cars or vessels, "shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading, and any person to whom the said receipt or bill of lading may be transferred shall be deemed and taken to be the owner of the goods, wares, or merchandise therein specified," etc. Mitchell, J., delivering the opinion of the court, said of this statute: "It was not intended to totally change the character of bills of lading, and put them on the footing of bills of exchange, and charge the negotiation of them with the consequences which attend or follow the negotiation of bills or notes. On the contrary, we think the sole object of the statute was to prescribe the mode of transferring or assigning bills of lading, and to provide that such transfer and delivery of these symbols of property should, for certain purposes, be equivalent to an actual transfer and delivery of the property itself."

Our conclusion is, that it would be a perversion of the manifest purpose of the statute to construe it as having the effect of putting the symbol of the property upon a higher plane, as an evidence of title, than the actual possession of property it describes. The statute does not undertake to make the transfer and delivery of the symbol more than the equivalent of an actual transfer and delivery of the property itself.

Conceding that the clause in the contract of pledge, "which cotton has been advanced upon by us to its full value," does not show that the pledgor's character as a factor was recognized in the transaction, and that it was the intention of the parties to limit the operation of the pledge to the pledgor's actual interest in the cotton by reason of advances made upon it, we have, then, the simple case of a pledge by a factor of the property of his principal for his own use. The

warehouse receipts which he obtained are to be regarded as the cotton itself which he held in the capacity of an agent to sell. We have no "Factor's Act" to raise up a statutory estoppel against the owner, based upon his act in intrusting the factor with possession of the goods, or documentary evidence of ownership and right of disposal, and thereby leading innocent third persons to deal with the factor on the faith of his apparent ownership. There is nothing to take this case out of the influence of the common-law rule, which protects the owner of personal property against an unauthorized ¹⁴² pledge of it by one who held it merely as a factor or agent to sell. The original defendants, the warehousemen, having disclaimed all interest in the suit, the plaintiff was entitled to recover his cotton, and the claim of the bank, based upon the attempted pledge by the H. C. Keeble Company, presented no legal obstacle to the plaintiff's recovery.

It affirmatively appears that the appellant was not injured by the admission of evidence of the market value of the cotton prior to the date of the transfer of the warehouse receipts. That evidence was that in September the cotton was worth nine and three-eighths cents per pound. The undisputed evidence was that the cotton was worth nine cents per pound in December and January, after the transfer of the warehouse receipts. The jury assessed the value of all of it at only nine cents per pound. This valuation was supported by the undisputed evidence, excluding the evidence of the higher value in September.

In view of the conclusion that on the undisputed evidence the plaintiff was entitled to recover, it is unnecessary to consider the various charges given and refused.

Affirmed.

THE subsequent case of *Commercial Bank of Selma v. Lee*, 99 Ala. 493, was in all material respects similar to the principal case. The court reaffirmed the doctrine of the principal case, and decided that when a warehouse receipt for cotton taken in the name of a factor or agent to sell recites the name of the principal and real owner, and is afterwards pledged by the factor without authority, as security for a note containing an indorsement that such "cotton has been advanced upon to its full value" by the factor, the pledgee of the warehouse receipt takes it with notice of the true state of account between the principal and his factor, and becomes the purchaser and owner of only such interest and claim as the factor can assert. The remaining interest or title of the principal is not divested by the transaction.

FACTORS—AUTHORITY TO PLEDGE GOODS.—A factor cannot pledge for his own debt property intrusted to him to be sold by his principal: *Miller v.*

Schneider, 19 La. Ann. 300; 92 Am. Dec. 535; *First Nat. Bank v. Nelson*, 38 Ga. 391; 95 Am. Dec. 400, and note; *McCreary v. Gaines*, 55 Tex. 485; 40 Am. Rep. 818; *Lallande v. Creditors*, 42 La. Ann. 705; *Merchants' Bank v. Pope*, 19 Or. 35; *Wright v. Solomon*, 19 Cal. 64; 79 Am. Dec. 196, and note. The party receiving such a pledge and advancing his money acquires no title as against the principal: *Bott v. McCoy*, 20 Ala. 578; 56 Am. Dec. 223, and note. See the extended note to *Bigelow v. Walker*, 58 Am. Dec. 163.

WAREHOUSEMEN—RECEIPTS—NEGOTIABILITY OF.—In the absence of a statutory provision a warehouse receipt is not negotiable: *Solomon v. Bushnell*, 11 Or. 277; 50 Am. Rep. 475; *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419; 2 Am. Rep. 408; *Burton v. Curyea*, 40 Ill. 320; 89 Am. Dec. 350, and note. See, also, the notes to *Robson v. Swart*, 100 Am. Dec. 243; *Hale v. Milwaukee Dock Co.*, 99 Am. Dec. 173, and the extended note to *Rice v. Outler*, 84 Am. Dec. 753.

PARKER v. PARKER.

[99 ALABAMA, 239.]

PARTNERSHIP—DISSOLUTION BY DEATH—DISPOSITION OF PROPERTY.—On the death of a partner the firm of which he was a member is *eo instanti* dissolved, and one of the consequences of such dissolution is that his distributees, as to the personal assets, become joint owners, and his heirs, as to the realty, become cotenants with the surviving partner.

PARTNERSHIP—DISSOLUTION BY DEATH—DISPOSITION OF PROPERTY.—At the dissolution of a partnership by the death of one of the partners the title to the personal assets devolves on the survivor to be used to pay the debts of the partnership, the residue to be distributed among the representatives of the deceased; but the title to the partnership realty devolves on the heirs of the deceased partner, subject in equity to be converted into partnership assets and used for partnership purposes.

PARTNERSHIP—DISSOLUTION BY DEATH—PARTIES TO SETTLEMENT.—In a suit touching the final settlement under administration of the interest of a deceased partner in the lands or assets of the partnership, his heirs are necessary parties, and their nonjoinder may be taken advantage of by objection, or, in the absence of objection, by the court *ex mero motu*.

INFANCY—GUARDIAN AD LITEM—ALLOWANCE OF ATTORNEY'S FEE.—No one can properly represent an infant defendant in a suit as guardian *ad litem*, or as his attorney, who has an engagement to represent an adverse interest, however slight, and, when not properly represented by a guardian *ad litem*, an allowance for attorney's fees for services rendered the infant is erroneous.

PARTNERSHIP—IMPROVEMENTS BY SURVIVING PARTNER.—When a surviving partner erects improvements on the partnership realty the respective interests of himself and the heirs of the deceased partner in the property may be determined in a suit to settle the partnership accounts without partition of the property; but the surviving partner cannot charge such heirs with their share of expenses incurred in erecting such improvements, in the absence of an express agreement on their part, or such course of dealing as shows an implied agreement to that effect.

BILL in equity by Mrs. Lancy J. Parker, against H. Z. Parker, the father of Stephen D. Parker, complainant's deceased husband, and administrator *de bonis non* of his estate, to secure a settlement of his administration, and of the accounts of a partnership which had existed between the Parkers. The complainant first married Stephen D. Parker, who died intestate in July, 1886, leaving four minor children; she afterwards married W. F. Parker, her present husband. Stephen D. Parker at the time of his death, and for a number of years prior thereto, was a partner with H. Z. Parker, and the firm did a large and successful mercantile business. Upon the death of the complainant's first husband, Stephen, she became administrator of his estate, but H. Z. Parker was her trusted adviser, and attended to nearly all of the business for her. Upon her second marriage she resigned such administration, and H. Z. Parker, with her consent, thereupon became the administrator *de bonis non* of said estate, and the guardian of her minor children. He made a partial but very unsatisfactory settlement of his administration in December, 1889, which purported to show all the assets of the estate. Complainant in her bill averred that H. Z. Parker, the "defendant, is an old man, and is incapable of managing the affairs of the estate; that he seems to take no interest in the business; that he has an extensive business of his own which he neglects, and knows and cares nothing for the distributees of the estate of her husband; that its management is intrusted to strangers; that he has failed to account for the property on the inventory and appraisement; that as surviving partner of H. Z. Parker & Son he has failed to settle the copartnership business, which is so connected with the estate as that the aid of a court of chancery is necessary to finally settle the administration of said estate." The prayer of the bill was, that said Parker, administrator, be made a party respondent, that he be required to settle the affairs of the estate, that he be required to state an account between himself and his deceased partner, and as administrator of his estate, that upon final hearing and settlement he be removed as administrator and guardian, and that some other person be appointed in his stead. The minor children and heirs of Stephen D. Parker were not made parties to the action, nor was process prayed, issued, or served against them, and no guardian *ad litem* was appointed for them. It appears, however, from the record that one J. D. Bailey filed an answer to the bill

as "guardian *ad litem* for the above-named heirs," but made no other appearance for them except to file a written motion as their guardian *ad litem* to have a credit for five hundred dollars claimed by the complainant disallowed. The defendant, H. Z. Parker, by answer, admitted the partnership as well as the allegations of the bill as to the administrations on the estate of S. D. Parker. He admitted his connection therewith, but denied his neglect or mismanagement thereof, and alleged that he proceeded promptly to wind up the partnership affairs and to collect its assets, and to that end the goods and assets of the firm on hand at the time of the death of his son were inventoried and appraised at their value, and under order of the court were sold, he becoming the purchaser, and that he was willing to settle in court as surviving partner and administrator. From the record it appeared that the partnership owned several parcels of real estate, among them the storehouse and lot on which they did business; that this property was conveyed to H. Z. Parker & Son, by deed dated December 11, 1878, "and it is stated that the complainant introduced the deed in evidence, but it nowhere appears in the record. It also further appears that, after the death of Stephen D. Parker, the defendant procured the complainant, in consideration of two hundred and fifty dollars, to execute a deed to him of her husband's interest in the lot, but for what purpose, or on what authority, is not shown; and it is stated that complainant offered that deed also in evidence, but it is not to be found in the transcript. The proof tends further to show that H. Z. Parker paid five hundred dollars for the firm, out of his own means, for this property, and that the deceased partner never paid any part of it. After the death of the deceased, it is shown, without conflict, that H. Z. Parker erected on the lot belonging to the firm a brick building, used for a hotel above, with two stores beneath, at a cost of seven thousand five hundred dollars, which was paid out of his own means; and for this sum, he seeks to be reimbursed out of the partnership assets, if the property is not adjudged to be his." The appeal was taken from "a decree taking jurisdiction of the settlement of the estate of said intestate, Stephen D. Parker, and ordering a reference to the register, requiring him to state an account on final settlement of the partnership of H. Z. Parker & Son with H. Z. Parker as surviving partner, and requiring said Parker to file with the register, within thirty days, his account

and statement for such final settlement, with instructions appropriate for the proper statement of such account. It was further ordered that "as soon as the report of the register hereinbefore ordered in regard to the partnership of H. Z. Parker & Son shall be filed and confirmed, that said H. Z. Parker, as administrator of the estate of S. D. Parker, deceased, is hereby required to file with the register of this court his account and vouchers for a final settlement of the same," and that the register proceed thereupon to audit and state said account on final settlement of said estate.

W. D. Roberts and M. Sollic, for the appellant.

Borders & Carmichael, for the appellee.

243 HARALSON, J. The assignments of error are so general, and the transcript so voluminous, that one would hardly ascertain in what the alleged errors consisted, except for the fact that the appellant's counsel have called attention to them in the brief they have filed.

The fact seems to have been overlooked by the court and counsel on both sides, that the infant distributees of the intestate, whose estate the bill in this case was filed to settle, have not, as complainants or defendants, been made parties to the suit. The complainant filed the bill, as one would suppose, more especially in the interest of her children, as together they were more largely interested than she. They owned four-fifths of the assets of the estate of their deceased father when finally settled; and the lands of the intestate—the estate being solvent—descended to them, subject only to the widow's dower, if she was entitled to any. On the death of the deceased partner the firm of which he was a member was *eo instanti* dissolved, and one of the consequences of the dissolution by death was (subject to well-defined limitations) that the distributees, as to the personal assets, became joint owners, and the heirs, as to the realty, became tenants in common with the surviving partner: Story on Partnerships, sec. 346. The title to the personal assets, in a case of the kind, devolves on the survivor, to be used for the purpose of paying the debts of the partnership, and thereafter for distribution among the representatives of the deceased; but the title to the real property of the firm devolves on the heirs of the deceased member, subject in equity to be converted into partnership effects, and used for certain partnership purposes. In any suit, therefore, touching the interest of a deceased partner in the

lands of the partnership, his heirs are necessary parties: *Abernathy v. Moses*, 73 Ala. 381. And it may be stated as a general rule that in a bill for final settlement of the estate of a deceased intestate all the next of kin are necessary parties, so that, as Story expresses it, "the rights and claims of all may be conveniently established at the same time and in the same suit": Story's Equity Pleading, secs. 89, 205, 207; *Teague v. Corbitt*, 57 Ala. 537. And when a suit in equity cannot be disposed of properly on its merits, for the want of necessary parties, objection may be taken on error, and in the absence of objection, by the court, *ex mero motu*: *Lawson v. Alabama Warehouse Co.*, 73 Ala. 294; *Boyle v. Williams*, 72 Ala. 353; *Prout v. Hoge*, 57 Ala. 29.

As the case must be reversed, because the infant children of the deceased intestate, who were his only next of kin and heirs at law, were not made parties, it may be well, for the ²⁴⁴ purposes of another trial, to refer to some of the alleged errors in the final decree.

On the ground that the interests of the complainant and infants in the litigation were supposed to be in substantial accord, without reference to the fact whether they were employed by the guardian *ad litem* of the infants, or represented them by other authority, the chancellor allowed the solicitors of the complainant two hundred dollars as a fee for their representation of said minors in this suit. He also allowed one hundred dollars to the defendant's solicitor, for his services as guardian of said minors, and to the guardian *ad litem* he allowed a fee of twenty dollars. These allowances were not proper. The infants were not parties, to be represented by anybody. And, if they had been, their interests were opposed throughout to those of the defendant, and, in one aspect of the case, to those of the complainant. The guardian *ad litem* of minor defendants in any cause is their responsible representative; and no one can properly represent an infant, as guardian *ad litem*, or as his attorney, who has an engagement to represent an adverse interest, however slight.

It is said the defendant was improperly charged with two hundred and thirty-two dollars "on the Deshazo mortgage." On his statement of the receipts of the partnership we find that he charges himself with this amount, as collected from W. L. Deshazo. Defendant sought to show that this was a mistake, and he ought not to have charged himself with that item. The only evidence we have on the subject is that of

L. W. Kolb, taken before the register, and it is rather indefinite—too much so to be well understood. It was as follows: “W. L. Deshazo borrowed two hundred dollars, and interest, thirty-two dollars, from Mrs. L. J. Parker (the complainant). Mr. H. Z. Parker bought the mortgaged property, paying the difference between the mortgage and the value of the property, and gave Mrs. Parker credit for two hundred and thirty-two dollars on her account at the store of H. Z. Parker, which included both her account as administrator and individual.”

If Mrs. Parker lent Deshazo her own money, and took a mortgage to secure it, and the estate of S. D. Parker had no connection with the loan, and H. Z. Parker purchased the mortgage from her, and paid her, by giving her credit at his own store, and it was inadvertently charged, as an item of receipt by him of money for the partnership of H. Z. Parker & Son, the mistake ought to be corrected. It would be wrong in such case to charge him with it.

It appears from the evidence that the defendant advanced to complainant since his administration, for herself and children, for support and maintenance, the sum of nine hundred and fifty-four dollars and thirty-three cents. ²⁴⁵ The court required it to be ascertained how much of this sum was expended for the benefit of each distributee and the amounts to be charged to them, respectively, in distribution. On a legal settlement this would have been proper, if it was ascertained these sums were necessary to be advanced.

The evidence tends to show, though it is presented in an imperfect and very unsatisfactory form, that the storehouse and lot in Ozark was purchased for and conveyed by the seller to the firm of H. Z. Parker & Son; but it does appear that the purchase money was all advanced by H. Z. Parker, and none of it by the deceased partner. Defendant charged the amount of the purchase money, with interest to the firm, as so much money paid by him on account of the purchase of the property, and to this credit he was entitled. For some unexplained reason he procured a deed from the complainant, purporting, as the evidence tends to show, to convey the interest of her deceased husband in said lot to him. After the dissolution of the partnership by the death of his co-partner the defendant erected a brick building on said lot, the upper part of which is used as a hotel and the lower for two storerooms, which he paid for out of his own means, and which cost him, as is agreed, seven thousand five hun-

dred dollars; and this sum he seeks to have credited to himself on the partnership settlement. The chancellor refused, on final decree, to pass upon the interest of the heirs in the property, holding that the question was not properly before the court; but did charge the defendant with the increased rents of the property growing out of the improvements put on the lot by the defendant.

There is every reason to have this question settled in this suit. With all the parties in interest before the court, it is better to have it done, than to force them to resort to another bill for the purpose: *McMaken v. McMaken*, 18 Ala. 578; Story's Equity Pleading, sec. 72. It does not require partition to be made, as was supposed, before the interest of the survivor and of the heirs of the deceased partner in this property may be adjudicated. Without passing on the question now, we may refer to what the authorities seem to hold.

Mr. Freeman, in his work on Cotenancy and Partition, says: "Neither cotenant has any power to compel the other to unite with him in erecting buildings or making any other improvements upon the common property. If either chooses to make such improvements he cannot recover from the others their share of the expense incurred thereby, in the absence of an express agreement on their part, or such a ²⁴⁶ course of dealing as to convince the court that a mutual understanding existed between them to that effect": Freeman on Cotenancy and Partition, sec. 262; *Dech's Appeal*, 57 Pa. St. 472; *Ford v. Knapp*, 31 Hun, 522; *Bazemore v. Davis*, 55 Ga. 504; *Elrod v. Keller*, 89 Ind. 382; *Becnel v. Becnel*, 23 La. Ann. 150. And on this subject, see our own adjudications: *Ferris v. Montgomery Land Co.*, 94 Ala. 557; 33 Am. St. Rep. 146, and authorities there cited. And as to whether or not the cotenant making such improvements may be charged with the increase of the productive value of the property resulting from his improvements, see Freeman on Cotenancy and Partition, sec. 262; *Nelson v. Clay*, 7 J. J. Marsh. 138; 23 Am. Dec. 387.

We have made the foregoing suggestions, on the record as it now appears. When new parties are made, new facts and questions may arise, variant from those now presented.

Reversed and remanded. _____

PARTNERSHIP—DISSOLUTION BY DEATH.—The death of a partner puts an end to the copartnership: *Durant v. Pierson*, 124 N. Y. 444; 21 Am. St. Rep. 686; *Powell v. North*, 3 Ind. 392; 56 Am. Dec. 513. For a thorough

discussion of this subject, see the notes to the following cases: *Gilmere v. Haw*, 40 Am. St. Rep. 361; *Van Kleeck v. Hammell*, 24 Am. St. Rep. 185; *Stemmer's Appeal*, 98 Am. Dec. 261; *Laughlin v. Lorenz*, 86 Am. Dec. 600; and *Childs v. Hyde*, 77 Am. Dec. 115.

PARTNERSHIP BY DEATH—DISPOSITION OF PROPERTY.—Partnership effects on the dissolution of the firm by death will be primarily applied to the payment of the partnership debts: *Goldsmith v. Eichold*, 94 Ala. 116; 33 Am. St. Rep. 97, and note. See, also, on this point the note to *Van Kleeck v. Hammell*, 24 Am. St. Rep. 186. The effect of the dissolution of a partnership by the death of one of its members is to vest the legal title to the choses in action and the debts in the surviving partners as joint tenants: *Egberts v. Wood*, 3 Paige, 517; 24 Am. Dec. 236, and note; but the partnership realty descends to the heirs: *Yeatman v. Woods*, 6 Yerg. 20; 27 Am. Dec. 452; *Summey v. Patton*, Winst. Eq. 52; 86 Am. Dec. 451, and note.

INFANTS—ACTIONS AGAINST—NECESSITY FOR GUARDIAN AD LITEM.—A suit cannot be prosecuted against an infant defendant until a guardian *ad litem* is appointed: *Griffith v. Ventres*, 91 Ala. 336; 24 Am. St. Rep. 918; *Lehen v. Brummell*, 103 Mo. 546; 23 Am. St. Rep. 895; *Farris v. Richardson*, 6 Allen, 118; 83 Am. Dec. 618, and note; *McDaniel v. Correll*, 19 Ill. 226; 68 Am. Dec. 587, and note. See the note to *Alston v. Emerson*, 29 Am. St. Rep. 644.

INFANTS—GUARDIAN AD LITEM.—That the guardian *ad litem* of an infant must not be interested adversely to the infant in the subject matter of the controversy, see *Ralston v. Lakes*, 8 Iowa, 17; 74 Am. Dec. 291.

GERMAN SECURITY BANK v. CAMPBELL & Co.

[99 ALABAMA, 242.]

LIENS.—FRACTIONS OF DAYS ARE CONSIDERED in determining the priority of judgment liens arising from registration under a statute which, as between the different acts of registration, gives priority to the one first done. The judgment first filed is entitled to priority over one filed at a subsequent time on the same day.

LIENS.—FRACTIONS OF DAYS, WHEN CONSIDERED.—Whenever it is provided by statute that a lien shall attach upon the doing of an act by or on behalf of the party who asserts it, or seeks to fasten it upon property, fractions of a day are considered in determining the priority and consequent superiority as between liens resulting from or resting severally upon acts done on the same day.

PROCEEDINGS by a sheriff to obtain instructions from the court as to the application of money in his hands arising from the sale of property under several executions issued on judgments rendered on September 4, 1890, in favor of Campbell & Co., the Florence National Bank, the German Security Bank, and other creditors. The judgments in favor of the three first-named creditors were filed for registration on that

day, as follows: Campbell & Co. at 10:15 o'clock A. M.; Florence National Bank, 3:30 o'clock, P. M., and the German Security Bank at 9:45 o'clock P. M. Execution in favor of Campbell & Co. came to the hands of the sheriff on September 15, 1890, and the others on a day subsequent. The money in the sheriff's hand was not sufficient in amount to satisfy the judgment in favor of Campbell & Co. The court directed such money to be applied to the judgment in favor of the latter creditor, and the other creditors excepted and appealed.

E. O'Neal, for the appellants.

Simpson & Jones, for the appellee.

250 McCLELLAN, J. The sole question presented for review on this record is, whether fractions of a day are to be considered in determining the priorities of the liens of judgments registered in the office of the probate judge under the act of February 26, 1889: Acts 1888-89, p. 60. While there is a general rule of law, having reference, it is believed, mainly to the computation of the time within which an act may or must be done, that fractions of a day will not be taken into account, yet, in cases like this, where the conflicting claims of parties are dependent upon the priority in point of time at which they severally accrued or attached in the form in which they are sought to be effectuated, the true doctrine, we apprehend, is, that the actual and exact time of accrual must be ascertained, and the respective rights of the claimants determined with reference thereto. This principle is recognized by Mr. Wait, who, in effect, says ²⁵¹ that the fiction of law, that all acts done on the same day are to be held as done at the same time, does not obtain where rights depend upon the actual priority of acts done on the same day: 7 Wait's Actions and Defenses, 231. Lord Mansfield, in *Johnson v. Smith*, 2 Burr. 950, declared: "The court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work wrong, contrary to the real truth and substance of the thing." And this court, while recognizing the general doctrine, as above stated, that the law takes no account of the fractions of a day, has declared "that the same rule does not apply to statutes which, as between different acts, give a preference or priority to the one which is first done; and, in such cases, courts will regard the fractions of a day": *Lang v. Phillips*, 27 Ala. 311. And the

same general principle is maintained in the following cases: *Murfree v. Carmack*, 4 Yerg. 270; 26 Am. Dec. 232, and notes; *Biggam v. Merritt*, Walk. 430; 12 Am. Dec. 576.

The application of this doctrine to the statute in question, and to the case at bar arising thereunder, must result in giving controlling importance to the precise moment of time at which judgments are registered, so that priority of registration, to the extent of any fraction of a day, will carry with it priority and superiority of the lien which arises and attaches upon registration. This view finds support in all analogies of the law. It may be laid down as a very general proposition, that whenever it is provided that a lien shall attach upon the doing of an act by or in behalf of the party who asserts it, or seeks to fasten it upon property, as, for instance, the filing for record of a mortgage, the placing of an execution in the hands of a sheriff, and the like, fractions of a day will be considered in determining the priority, and consequent superiority, as between liens resulting from or resting severally upon acts done on the same day.

Adopting this view, we hold, with the court below, that the lien of the appellee, whose judgment was registered at an earlier hour of the day on which appellant's judgment was registered, was a superior lien on the property of the defendant in judgment, and entitled to be first satisfied.

The judgment of the circuit court is accordingly affirmed; and this judgment will be entered and take effect as of the date of the submission of this cause.

Affirmed and rendered. —

TIME—FRACTIONS OF DAY, WHEN CONSIDERED.—The law does not in general regard fractions of a day, except in cases where the hour itself is material, as where priority of judgments and the like is in question: *Mitchell v. Schoonover*, 16 Or. 211; 8 Am. St. Rep. 282, and note; *Murfree v. Carmack*, 4 Yerg. 270; 26 Am. Dec. 232, and extended note; *Biggam v. Merritt*, Walk. 430; 12 Am. Dec. 576, and note. Where it is necessary to justice, and it can be done, the courts may take notice of the fractions of a day: *Leavenworth Coal Co. v. Barber*, 47 Kan. 29.

JUDGMENT LIENS—PRIORITY BETWEEN JUDGMENTS ENTERED SAME DAY. If two judgments appear to have been entered the same day the court will ascertain which was first entered, and award it the preference: *Biggam v. Merritt*, Walk. 430; 12 Am. Dec. 576, and note. See the note to *Cook v. Dillon*, 74 Am. Dec. 358.

GRIDER v. AMERICAN FREEHOLD LAND MORTGAGE COMPANY.

[90 ALABAMA, 281.]

HOMESTEADS—ACTION TO REMOVE CLOUD—PARTIES.—A wife is improperly joined with her husband in an action by him to remove a cloud from the title to a homestead of which he is sole owner. Such misjoinder may be taken advantage of by demurrer.

ACKNOWLEDGMENTS — CONCLUSIVENESS — WHEN MAY BE IMPEACHED.—When a grantor or mortgagor appears before an authorized officer and makes an acknowledgment of the execution of the instrument, which is duly certified by the officer to have been made in conformity to law, his certificate is conclusive of the facts certified, and which he is by law authorized to certify, until successfully assailed for duress or fraud in which the grantee or mortgagee participated, or had notice of before parting with the consideration; but if there was in fact no appearance before the officer, and no acknowledgment, this may be shown, and, when proved, renders the certificate of acknowledgment and the instrument void, even though the grantee or mortgagee is a purchaser for value without notice.

ACKNOWLEDGMENTS—IMPEACHING.—The certificate of acknowledgment of a deed or mortgage of a homestead by a married woman may be impeached, and the instrument avoided, by proving that she never in fact appeared before the officer making the certificate, or acknowledged the deed or mortgage to him. This rule may be enforced against an innocent purchaser without notice.

EQUITY—MORTGAGE—REMOVAL OF A CLOUD ON TITLE.—A mortgagor who seeks in equity to cancel a mortgage on his homestead as a cloud on his title, on the ground of defects in its execution and acknowledgment, must offer to do equity by refunding the mortgage money with lawful interest.

BILL by W. M. Grider and his wife, Mary, against the American Freehold Land Mortgage Company, a foreign corporation, and the Loan Company, to enjoin the sale of certain lands claimed by complainants as a homestead; said sale being authorized by powers contained in two mortgages executed by them, one to each of said corporations, and to cancel said mortgages as a cloud on the homestead title. Judgment for defendants, and the complainants appealed.

Tompkins & Troy and D. S. Bethune, for the appellants.

G. L. Comer and Norman & Son, for the appellees.

283 **HEAD, J.** Though, technically, the averment of the bill proper would seem to lay the ownership of the homestead, upon which the mortgages mentioned are alleged to cast the clouds sought to be removed, in the complainants, W. M. Grider and his wife, jointly, yet in connection with the

exhibits we think it is intended to aver that the lands are the property of the husband solely. It is so treated in the argument of counsel on both sides, and so we will consider it. It is a case, then, of a wife joining in a bill with the husband to remove a cloud from the title of the latter's homestead. The objection of misjoinder of complainants is raised by demurrer, and we are of opinion it is well taken, and that the bill cannot be maintained with Mrs. Grider as a party complainant. Having no title, legal or equitable, she has no standing in court to obtain such relief: *Seaman v. Nolen*, 68 Ala. 463. *Vancleave v. Wilson*, 73 Ala. 387, is not an authority to the contrary. It may be that if the title to the homestead is clouded, whereby the wife may suffer injury by the probable loss of its use and enjoyment as a homestead, and the husband refuses to take the necessary ²⁸⁴ steps to have the clouds removed, she will be permitted by virtue of her incidental interests in the land, as wife and member of the owner's family, to come into equity to have the title of the husband made clear: *Seaman v. Nolen*, 68 Ala. 463. But such is not the scope or purpose of this bill. The husband is now seeking all the relief she could ask, and improperly joins her with him in the effort to obtain that relief. The demurrer for misjoinder was properly sustained.

An important question arising in this case is, What conclusiveness shall be accorded to the certificate of acknowledgment of the execution of a mortgage made in due form by an officer authorized by the laws of this state to take and certify such acknowledgments? The bill avers that Mrs. Grider, the wife, although she signed with her husband the mortgage to the American Freehold Land Mortgage Company of London (Limited), and although there is appended to the mortgage the certificate, in due form, of a justice of the peace, certifying her due acknowledgment of its execution, yet, in fact, she never made the said acknowledgment before said justice, or any other acknowledgment before any officer; that the justice of the peace was not present when she signed the mortgage, and never took any acknowledgment from her with reference to the execution of the same, and that said certificate of acknowledgment is wholly untrue. There is in the bill no charge of fraud or collusion on the part of any one in procuring the certificate; and upon the averments, as we find them, it must be assumed that the mortgagee took the mortgage and parted with its money in reliance upon the

truth of the certificate without any notice of its falsity. The complainants contend that they are entitled to show the fact alleged to avoid the mortgage of the homestead, even against a *bona fide* mortgagee without notice. The defendant contends that they are concluded by the certificate.

It must be regarded as settled by the great weight of authority that when the grantor or mortgagor appears before the officer, and makes an acknowledgment of the execution of the instrument, which is duly certified by the officer to have been made in conformity to law, the certificate is conclusive of the truth of all the facts therein certified, and which the officer was by law authorized to certify, until successfully assailed for duress or fraud in which the grantee or mortgagee participated, or of which he had notice at the time of parting with the consideration. The taking and certifying of the acknowledgment are held in many of the cases to be of a judicial nature, and when ²⁸⁵ the officer has jurisdiction, so to speak, by having the party acknowledging and the instrument to be acknowledged before him, and enters upon and exercises this jurisdiction, the parties will not be allowed to impeach the truth of the facts which he is required by law to certify, and does certify, in the absence of fraud or duress as above stated: *Louden v. Blythe*, 16 Pa. St. 532; 55 Am. Dec. 527; 27 Pa. St. 22; 67 Am. Dec. 442; *Hall v. Patterson*, 51 Pa. St. 289; *Heeter v. Glasgow*, 79 Pa. St. 79; 21 Am. Rep. 46; *Miller v. Wentworth*, 82 Pa. St. 280; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442; 24 Am. Rep. 204; *Schrader v. Decker*, 9 Pa. St. 14; 49 Am. Dec. 538; *Williams v. Pouns*, 48 Tex. 141; *Kocourek v. Marak*, 54 Tex. 201; 38 Am. Rep. 623; *Rollins v. Menager*, 22 W. Va. 461; *Henderson v. Smith*, 26 W. Va. 829; 53 Am. Rep. 139; *Moore v. Fuller*, 6 Or. 272; 25 Am. Rep. 524; *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89; *Lickmon v. Harding*, 65 Ill. 505; *Calmut etc. Co. v. Russell*, 68 Ill. 426; *Kerr v. Russell*, 69 Ill. 666; 18 Am. Rep. 634; *Stone v. Montgomery*, 35 Miss. 83; *Miller v. Marx*, 55 Ala. 322; *Cahall v. Citizens' Mutual Building Assn.*, 61 Ala. 232; *Moog v. Strang*, 69 Ala. 98; *Downing v. Blair*, 75 Ala. 216; *Griffith v. Ventress*, 91 Ala. 366; 24 Am. St. Rep. 918; *Shelton v. Aultman*, 82 Ala. 315.

In *Halso v. Seawright*, 65 Ala. 431, however, where the question was whether the clerk of a probate judge was authorized to take and certify an acknowledgment, the act was held to be of a ministerial and not judicial nature, and that,

therefore, the clerk was authorized; but in the later case of *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918, this court, without referring to *Halso v. Seawright*, 65 Ala. 431, declared it to be a judicial act, and this may now be regarded as the settled doctrine of this court. In *Shelton v. Aultman*, 82 Ala. 315, it was contended by counsel, upon the authority of *Halso v. Seawright*, 65 Ala. 431, that the decisions sustaining the conclusive character of the certificate should be overruled; arguing that as the officer acts in a ministerial capacity, as held in *Halso v. Seawright*, 65 Ala. 431, parol evidence should be admitted to falsify the certificate in any and every respect; but the court, speaking by Justice Clopton, said that whatever may be the capacity in which the officer acts, the rule as established may now be regarded as a rule of property, which it would be unwise and unsafe to disturb.

It must, therefore, as we have said, be considered as settled that where the grantor has appeared before the officer, and an acknowledgment of some kind has been taken, the certificate of the officer in due form, whether he acts ministerially or judicially, is conclusive of the facts certified, and which he is by law authorized to certify; but the same may be impeached for duress or fraud in which the grantee or ~~see~~ mortgagee participated, or had notice of before parting with his money.

We have examined a great many authorities, and find only the following wherein the question we are now called upon to decide, viz., What effect shall be accorded to the officer's certificate, when the allegation is that the party never in fact appeared before the officer, or made any acknowledgment at all, was raised or adjudicated.

In *Michener v. Cavender*, 38 Pa. St. 334, 80 Am. Dec. 486, the officer certified to the wife's acknowledgment. She in fact never appeared before him, or acknowledged the mortgage in any manner. The mortgagee was innocent. The court, recognizing the general rule above stated, in cases where there was an actual acknowledgment, ruled that the wife was not bound by the certificate, and discussed at some length the rights in such a case of the mortgagee, as a *bona fide* purchaser without notice. The judge said, *inter alia*: "To call the mortgagee a *bona fide* purchaser, and put her to proof that he knew she had been cheated, would be like making her right to reclaim stolen goods dependent on the receiver's knowledge of the felony. Suppose the mortgage was a for-

gery out and out, and Cavender chose to invest his money in a purchase of it, must it be enforced because he did not know he was buying a forged instrument? An instrument known to be forged would not be purchased, and would therefore be worthless to the forger. Counterfeit notes would never be issued if a herald went before to proclaim their spuriousness. But, because they are taken without notice, do they become genuine? To carry the doctrine of notice to such extent would subvert all law and justice. A purchaser of real estate who finds the deeds in the channels of the title all duly acknowledged is certainly not required to go up the stream, and inquire of every married woman if she executed her deed voluntarily, and acknowledged it according to law; and, if he pay his money on the faith of such title deeds, he is to be protected; and this probably is all that was meant by what judges have said about purchasing without notice."

In *Allen v. Lenoir*, 53 Miss. 321, the wife signed, but never in fact acknowledged, the mortgage, or went before the officer, as his certificate affirms she did. Judge Campbell said: "We cannot escape the conclusion, after an earnest effort to avoid it, that the mortgage was never acknowledged by Mrs. Lenoir, and that the certificate that she had acknowledged it is untrue. A proper acknowledgment is an essential part of the execution of a conveyance of her ²⁸⁷ land by a married woman. . . . The decree, being based on the mortgage, is erroneous." And in *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699, the same judge adhered to this view, and, upon a review of the authorities, distinguished such a case from the case where an acknowledgment of some kind was made, but assailed because not made, in respect of its details, in the manner required by law.

In *Borland v. Walrath*, 33 Iowa, 130, the wife neither signed nor acknowledged the mortgage, and the court held the certificate, which as to her was in due form, open to attack. The case, however, is unsatisfactory as authority on the point we are considering, since no allusion is made to the question of *bona fides* or notice on the part of the mortgagee: nor does it appear from the facts that he was a *bona fide* mortgagee without notice of the falsity of the certificate.

In *Smith v. Ward*, 2 Root, 374, 1 Am. Dec. 80, it was held that parol evidence is admissible to prove that the grantor did not appear before the certifying officer and make

acknowledgment; but, like the case last cited, the discussion is meager, and makes no reference to the rights of *bona fide* purchasers.

In *Meyer v. Gossett*, 38 Ark. 377, the court held that where there is no appearance before the officer, and no acknowledgment in fact, the officer's false certificate of acknowledgment is void *in toto*; but the distinction was closely drawn that, where there are an appearance and acknowledgment in some manner, the certificate is conclusive of every fact appearing on its face, and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition brought home to the grantee. It appeared that the grantee was a purchaser for value without notice of the falsity of the certificate. That case was adhered to in *Donahue v. Mills*, 41 Ark. 421.

In *Williamson v. Carskadden*, 36 Ohio St. 664, the general rule as to conclusiveness of the certificate is recognized, but the court say: "If it is true, as alleged by the defendants, that they never appeared before the officer, or acknowledged the execution of such mortgage, the certificate of acknowledgment is, as to them, fraudulent; and in availing themselves of that defense, it is not necessary to show that the mortgagee had notice of such fraud. In fact, the governing principle is very broad. Thus, it has been held that in an action on a recognizance, which is regarded as a record, a plea in bar that the defendant did not ²⁸⁸ acknowledge the recognizance is sufficient; and however it may be as to the right to attack a judgment on the ground that there was no jurisdiction over the person it is not denied that, in a proper case, a judgment may be directly impeached on that ground."

In *Mays v. Hedges*, 79 Ind. 288, it was held that a certificate of acknowledgment to a deed, made by the officer, merely on the assurance of another that the party executed it, is a nullity.

In *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, we have a very full and ample discussion of this subject, upon a review of the authorities, and the conclusion reached was that the certificate of acknowledgment of a deed by a married woman may be impeached and avoided, by proving that she never in fact appeared before the officer, or acknowledged the deed to him, and that this rule will be enforced against an innocent purchaser without notice. But if she appeared before the officer for the purpose of making the acknowledg-

ment, and attempted to do, in some manner, what the law required to be done, the certificate is conclusive of the facts therein stated, as regards innocent purchasers. In a dissenting opinion Judge Green took strong ground against this conclusion. He maintained that the act of the officer is judicial, and likened it to the entry of a fine, and said: "It only remains to inquire whether, if the entry on the record book of a court of general jurisdiction, and which court only could enter a fine, was that the married woman personally appeared before the court and acknowledged the fine in the appropriate manner, she could, by parol evidence, contradict this statement on the record book. I think it well settled that she could no more contradict the statement on the record that she personally appeared before the court than she could contradict the further statement on the same book of such court that she acknowledged the fine in the proper manner."

In line with this dissenting opinion, *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634, held that the statute authorizing certain officers to take the private acknowledgment of a wife to a conveyance is a substitute for the proceeding at common law by fine and recovery, whereby the rights of the wife, on the one hand, may be guarded, and on the other the rights of the grantee may be assured; that as a fine and recovery at common law was subject to impeachment for fraud, so the certificate of acknowledgment of a deed by a wife may be impeached; but the proof to sustain such a charge must be of the clearest, strongest, and most convincing character ²⁸⁹ and by disinterested witnesses; that an innocent purchaser of land has a right to rely upon the record of a deed which shows upon its face that the wife has executed and properly acknowledged the deed with her husband, and the wife will not be allowed to avoid the same, as to such purchasers without notice, by showing her signature to be a forgery, and that she never in fact acknowledged the same. The court, in the opinion, discuss the subject at length, and give strong and cogent reasons for the decision. There are other Illinois cases in support of this: *Graham v. Anderson*, 42 Ill. 514; 92 Am. Dec. 89; *Lickmon v. Harding*, 65 Ill. 505; *Calumet etc. Co. v. Russell*, 68 Ill. 426.

In *Barnett v. Proskauer*, 62 Ala. 486, the wife neither signed nor acknowledged the mortgage assailed, but the husband, without her knowledge or consent, signed her name, and made the acknowledgment. It does not appear whether the

mortgagee was a *bona fide* purchaser without notice of the actual nonexecution of the mortgage by the wife, and falsity of the officer's certificate, or not. That question was not raised. In the opinion, Brickell, C. J., said: "The certificate of acknowledgment, or proof of probate, taking the places of proof by the subscribing witnesses, or of the handwriting of the grantor, may also be contradicted, and parol evidence is admissible to falsify it. It is an official act, done under the obligation of an official oath, and protected by the presumptions the law necessarily indulges in favor of the acts of its own officers. The burden of proof is on those who assail the verity of the certificate, and it can be successfully impeached only by clear and convincing evidence that the deed was not executed by the grantor, when the issue is limited, as in the present case, to the fact of execution." And it was held the wife was not bound.

In *Cahall v. Citizens' Mut. Building Assn.*, 61 Ala. 232, it is said, *obiter dictum*: "The certificate of the notary could not be impeached without showing the signature of the wife was forged, or that she was subject to duress, or that fraud was practiced on her, with the knowledge of the grantee."

In *Shelton v. Aultman*, 82 Ala. 315, Justice Clopton, speaking for the court, construed the language we quoted above from *Barnett v. Proskauer*, 62 Ala. 486, to mean that, as to the execution of the conveyance, the certificate may be disproved in all cases; and in the opinion he said: "The rule settled by the decisions is, that as to all matters, except the execution of the conveyance, the certificate, ²⁹⁰ when substantially conforming to the statute, is conclusive, unless impeached by allegation, and clear proof of fraud or imposition practiced on the wife, in which the officer or grantee participated." In that case, it may be seen, there was no question raised as to the actual signing of the conveyance by the wife, or the total want of an acknowledgment by her. The objection made was that she was not examined separate and apart from the husband; so that the distinction drawn by the judge between the execution of the conveyance and other matters may be said to be *dictum* merely. Moreover, we think the judge misinterpreted the language of *Barnett v. Proskauer*, 62 Ala. 486. It was, we think, a mere statement of the burden of proof as to the fact of execution, when that fact was the matter in issue. The language was: "The burden of proof is on those who assail the verity of the certifi-

cate, and it can be successfully impeached only by clear and convincing evidence that the deed was not executed by the grantor, when the issue is limited, as in the present case, to the fact of execution."

From the foregoing review of the authorities, we must realize that the question we are called upon to decide is by no means free from difficulty. We know the absolute and implied faith and trust which, in practice, purchasers of real estate repose, and must necessarily repose, in the formal and regular certificates of authorized officers, authenticating the regular and legal execution of conveyances, and the disastrous consequences which may flow from a rule which would allow those certificates to be questioned and set aside against purchasers who have parted with valuable interests in reliance upon them; yet, on the other hand, we perceive the manifest injustice of a rule which would deprive one of his property, without his knowledge or consent, upon the mere baseless fabrication of another.

Under the laws of this state the official examination and acknowledgment of the wife prescribed by the statute, and duly certified by the officer, are essential and indispensable parts of the valid execution of a conveyance of the husband's homestead. Without them there is no execution of the conveyance. It matters not how formally signed or abundantly attested, if these statutory requisites are wanting, the conveyance is a nullity. In *Allen v. Lenoir*, 53 Miss. 321, the court said: "A proper acknowledgment is an essential part of the execution of a conveyance of her land by a married woman"; and this court in *Griffith v. Ventress*, 91 Ala. 366, 24 Am. St. Rep. 918, quoted approvingly a similar utterance of ²⁹¹ the same court in *Harmon v. McGee*, 57 Miss. 414. The objection to the mortgages, therefore, made by the present bill essentially is, that they were never executed, so far as they affect the homestead.

Upon due consideration we are of opinion that the better rule, and the one sustained by the weight of authority, is that, when there has been no appearance before the officer, and no acknowledgment at all made, it may be shown in disproof of the officer's certificate, even against *bona fide* mortgagees and purchasers. We approve the rule as it is stated in 1 American and English Encyclopedia of Law, section 6, page 160: "When there is no appearance before an officer his false certificate of acknowledgment is void; but

when there is an appearance and acknowledgment of it in some manner, then the official certificate is conclusive of every fact appearing on its face; and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition, and where knowledge or notice of the fraud or imposition is brought home to the grantee." This must be taken with the qualification that the certificate is conclusive only of the facts the officer is by law authorized to certify.

What we have said applies with greater force to the mortgage to the Loan Company of Alabama, sought by the bill to be set aside, since the allegation is that that instrument was neither signed nor acknowledged by Mrs. Grider.

It follows that, aside from the misjoinder hereinbefore noticed, there is equity in the bill, upon sufficient allegations to vacate the two mortgages mentioned, so far as the homestead is concerned, unless the bill is deficient, as insisted in the demurrer, for its failure to offer to do equity, by offering to pay to the mortgagees the amounts received under and by virtue of the mortgages.

We are of the opinion this ground of demurrer is well taken. We held in *American Freehold Land Mortgage Co. v. Sewell*, 92 Ala. 163, and again in *New England Mortgage Security Co. v. Powell*, 97 Ala. 483, that a complainant seeking to cancel, as a cloud on his title, a mortgage executed by him to a foreign corporation, for money loaned, on the ground that the mortgage was void because the corporation had not complied with the laws of this state authorizing it to do business here, or because the mortgage, being governed by the laws of New York, was void for violation of the usury laws of that state, must offer in his bill to repay what he had received under and in faith of the mortgage security, as a condition of the relief sought. We intend to ~~292~~ adhere to that doctrine. We cannot assent to the proposition that a person can obtain another's money upon the faith and assurance of a mortgage security, and the next moment after he receives and appropriates it go into a court of conscience, where the maxim that he who seeks equity must do equity has ever been vigorously upheld and applied, and ask that court to cancel the security as a cloud on his title, still retaining the money, and making no offer to return or repay it. If Grider needs and desires the aid of a court of chancery to clear his title of the void encumbrances he must offer to repay the money he re-

ceived, with lawful interest. If he is unwilling to do this he must stand upon his rights at law. Equity will not help him.

The ground of demurrer last considered, being well taken, should have been sustained.

The chancellor erred in sustaining the demurrer on the ground assigned, that the certificates of acknowledgment were conclusive. The complainants may amend the bill within thirty days, with power in the court below to extend the time, if necessary.

Reversed and remanded.

THE case of *Giddens v. Bolling*, 99 Ala. 319, was similar in all material respects to the principal case. In the former case the court said: "The question which lies at the foundation of the homestead claim of Mrs. Giddens, on the ground upon which the bill places it, viz., that she never signed or acknowledged the mortgage, has recently received careful consideration at our hands, and the principle which controls in such an issue, as we then announced, is that when there has been no appearance before the officer, and no acknowledgment at all made, the fact may be shown in disproof of the officer's certificate, even against *bona fide* mortgagees and purchasers, and his false certificate is void; "but, when there is an appearance and acknowledgment in some manner, then the official certificate is conclusive of every fact appearing on its face, and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition, and where knowledge or notice of the fraud or imposition is brought home to the grantee": *Grider v. American Freehold L. M. Co.*, 99 Ala. 281; *ante*, p. 58; 1 Am. & Eng. Ency. of Law, sec. 6, p. 160." It was also decided on the authority of the principal case that a mortgagor of a homestead seeking to cancel the mortgage as a cloud on his title, on the ground of defects in its execution and acknowledgment, must, before he is entitled to relief, do equity by refunding the mortgage money with lawful interest.

ACKNOWLEDGMENTS—CONCLUSIVENESS OF.—An officer's certificate of acknowledgment is conclusive as to the matters therein contained, except for fraud in the party benefited or mistake by the officer, or in direct proceedings against the officer or his sureties: *Davis v. Jenkins*, 93 Ky. 353; 40 Am. St. Rep. 197, and note, with the cases collected.

ACKNOWLEDGMENT BY MARRIED WOMAN—IMPEACHMENT.—A married woman may impeach a certificate that she acknowledged a deed, by proving that she did not in fact appear before the officer certifying such acknowledgment, nor otherwise acknowledge such deed, and that it was never delivered by her or with her consent: *Le Mesnager v. Hamilton*, 101 Cal. 532; 40 Am. St. Rep. 81, and note with the cases collected.

EQUITY—CANCELLATION OF INSTRUMENTS—RETURN OF CONSIDERATION.—A party praying for cancellation of a conveyance must tender the money received thereon: *Cates v. Sparkman*, 73 Tex. 619; 15 Am. St. Rep. 806, and note. One who comes into equity for relief against a cloud cast by foreclosure proceedings upon his interest, which escaped being bound by

the decree in foreclosure, will be required, as a condition for relief, to pay his proportion of the mortgage debt, less the amount of the rents and profits of his interest received by the mortgagee who purchased at the foreclosure sale: *Johnson v. San Francisco Sav. Union*, 75 Cal. 134; 7 Am. St. Rep. 129. See, also, the extended note to *Johnson v. Means*, 50 Am. Dec. 674.

RICHMOND AND DANVILLE RAILROAD COMPANY v. TROUSDALE AND SONS.

[99 ALABAMA, 8-9.]

CARRIERS—CONTRACT OF AFFREIGHTMENT, WHERE ENFORCEABLE.—A contract for the carriage of livestock, entered into with a foreign railroad company operating a line of road within a certain state, by a resident of that state, for transportation of the stock from that state to another, is a contract made in the former state, and may be enforced there.

CARRIERS OF LIVESTOCK—PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF.—If a common carrier, having undertaken to deliver livestock, fails to deliver it in safe condition within a reasonable time, a presumption of negligence arises, and the burden of proof rests on it to excuse itself from negligence and to show that the injury to the stock did not result from the delay.

CARRIERS OF LIVESTOCK—NEGLIGENT DELAY.—MEASURE OF DAMAGES against a carrier of livestock for negligent delay in transportation and delivery is the difference in value of the animals at the time they should have been delivered in the condition they would have been at that time, and their value when they were delivered in the condition they were at that time; in other words, the damages are measured by the change in the condition of the stock wrought by the unreasonable delay, if such change has been wrought.

CARRIERS OF LIVESTOCK—DAMAGES FOR NEGLIGENT DELAY IN DELIVERY. A carrier of livestock is liable for all damage that is referable to a negligent prolongation of the transportation through its natural effect upon the physical condition or latent vicious propensities of the animals, whereby they are reduced in strength or weight more than they would have been had prompt carriage and delivery been made, and injure each other in consequence of viciousness, aroused by the excess of their confinement beyond the time necessary for transportation and delivery.

CARRIERS OF LIVESTOCK—EVIDENCE OF CUSTOM.—In an action against a carrier of livestock to recover for injury to animals caused by negligent delay in transporting them, evidence of a custom making it the duty of the shipper to accompany his stock is not admissible if it does not appear that the performance of such duty would have avoided the injury, or that its remission contributed thereto.

ACTION to recover damages for failure of a railroad company to deliver livestock within a reasonable time. Plaintiff requested the court to charge the jury as follows: "6. The jury are charged that the evidence is undisputed that a rea-

sonable time for the delivery of said animals, after the delivery of same to the railroad, is ten or twelve hours, and, if their being kept on the car for a longer time by the defendant caused them to be vicious and to injure one another, the defendant is liable to answer in damage for such injury." This charge was given over defendant's objection and exception. The defendant requested, and excepted to the refusal of the court to give, the following charges: "1. The common-law rule was that a common carrier was an insurer of goods intrusted to it for carriage; and that if such goods were lost, destroyed, or injured, the burden of proof was on the carrier, in an action for the damages, to acquit itself of negligence, or to show that the loss or injury was caused by the act of God, or the public enemy; but that rule does not apply in this case, because the articles are livestock, which by their nature are susceptible to injury during the transportation; and in such a case the common carrier is not liable, except for actual negligence causing or contributing to the injury complained of, which negligence must be shown by actual proof in the case." "4. If the jury believe from the evidence that the only injury sustained by the animals was such as animals usually sustain when undergoing transportation on railroads, they can find only nominal damages—that is to say, some small amount, as one dollar, or one cent." "12. The burden of proof is on the plaintiff to show that its animals were injured through the defendant's negligence, and this burden is not shifted by proof that the defendant failed to deliver them within a reasonable time, and that they were in an injured condition, because, by their very nature, such animals are liable to injury during transportation in a railroad car." "16. The measure of damages in this case is not the difference between the market value in Atlanta of the animals immediately upon their arrival there and their probable market value had they promptly arrived there without injury. It is the duty of every person who has sustained injury to his property to use every reasonable effort to repair the injury; and the jury should consider whether or not the plaintiff could reasonably have repaired the injury to his stock after their arrival in Atlanta, by such remedies as due skill would have suggested to a man of ordinary prudence in his situation; and if you find from the evidence that by the due use of such skill such injury could have been repaired, and the market value of the animals thereby become restored,

your verdict cannot be for more than nominal damages." Judgment for plaintiff, and the defendant appealed.

James Weatherly, for the appellant.

Gregg & Thornton, for the appellee.

³⁰³ McCLELLAN, J. This action is prosecuted by Trousdale & Sons, a domestic corporation, against the Richmond & Danville Railroad Company, a foreign corporation. It sounds in damages for the breach of a contract of affreightment, whereby the defendant undertook to promptly and safely transport certain livestock from Birmingham, Alabama, to Atlanta, Georgia, and there deliver them to the plaintiff, which was both consignor and consignee. The contract was made in Birmingham, Alabama, where the plaintiff was domiciled, and where the defendant was present by its agents, and whence it operated a line of railway to Atlanta, Georgia, a great part of which was in ³⁰⁴ Alabama, and over which the transportation was to be effected. This was, therefore, an Alabama contract, not only made here, but in part to be performed here; and the courts of this state clearly, we think, have jurisdiction, service being had, of its action for its breach, notwithstanding the defendant is a foreign corporation, and its full discharge was to be consummated by delivery to the consignee in another state: See *Central R. R. etc. Co. v. Carr*, 76 Ala. 388; 52 Am. Rep. 339.

The evidence tended to show that the animals when delivered in Atlanta, from thirty-four to thirty-six hours after they should have been delivered—a reasonable time for transportation and delivery being put at from ten to twelve hours, and the time required in this instance at forty-six hours—"had been down and were skinned up," that they "looked very thin, hollow, skinned, and scalded from standing in the car," "seemed to be feverish," "one lame in hind legs and limping," one specially valuable horse "was sore and lame, and appeared to have no life," twelve others "all sore, and lame, and skinned," etc.; that all the stock were in excellent condition when shipped from Birmingham, and that the bad condition in which they were on arrival at Atlanta was due to the fact that they were kept on the cars a very much longer time than was necessary for their transportation and delivery, without water or food. On the other hand, there was evidence tending to show that the animals, or some of them, were not in a sound condition when they were received

for shipment, and that the diseases and hurts they exhibited on delivery in Atlanta existed or had been sustained before they were shipped, and did not result from their transportation at all. It is insisted that the trial court assumed or declared the falsity of the evidence last referred to, or that in effect it was withdrawn from the consideration of the jury by the instructions given. We think not. The charges supposed to have this infirmity are as follows: "If the defendant, having undertaken to deliver the stock, failed to deliver it in a safe condition, within a reasonable time, the presumption of negligence arises, and the burden of proof is shifted to the defendant, to excuse itself from negligence"; and again: "If the jury believe from the evidence that the plaintiff is entitled to recover, the measure of the damage is the difference in the market value of the stock in Atlanta, Georgia, if they had been delivered without any delay in shipment or delivery, and their market value after their delivery in Atlanta, Georgia, in the condition the evidence shows ~~was~~ they were in." The first charge quoted we understand to mean only this: that if there has been unreasonable delay on the part of the defendant in the transportation and delivery of the livestock, and when, after such unreasonable delay, they are found to be in an unsound condition, the *onus* is then on the defendant to show that the unsound condition of the stock was not due to the unreasonable delay in transportation; or, in other words, that evidence of unreasonable delay and the existence of injuries on delivery raises a *prima facie* presumption that the delay was negligent and the injuries resulted from it, and puts it on the defendant to rebut this presumption, and show either that there was no negligent delay (which was not attempted to be shown in this case), or, conceding the delay, that the injuries did not result from it, but (as was attempted to be done in this case) that the stock was in an unsound condition—had received the injuries complained of—before the shipment. This we understand to be the law, especially where, as in this case, the contract of affreightment sets forth that the stock when received was "in outward apparent good order," and the injuries counted on and shown in the testimony were "outward and apparent." This charge does not assume that the defendant has not discharged this burden, nor does it take away from the jury or tend to mislead them to forego the right to find on the whole evidence that the stock was un-

sound when it came to the hands of the carrier. And so with the other charge quoted which was given at the request of the plaintiff. It does not assume that the stock was injured in the transportation, but asserts only that if the jury should find negligent delay—as to which there was no controversy—in the transportation and delivery, the measure of plaintiff's recovery would be the difference in value of the animals at the time they should have been delivered in the condition they would have been at that time and their value when they were delivered in the condition they were at that time. This did not tend to prevent the jury to find that their injuries were not caused by the delay, but existed before the carriage began, and hence that their condition was the same when they were delivered as when they should have been delivered. The instruction in effect was, that, if the jury found any damages at all for plaintiff, it should be measured by the change in the condition of the livestock wrought by the unreasonable delay, if such change had been wrought.

It may be true that railroad transportation of livestock always and inevitably involves reduction in their weight, ~~and~~ some lameness, and even abnormal weakness; but that this is true and that these effects, incident to the nature of the subject matter and the manner of transportation, cannot be made the basis of a recovery in damages where there has been no negligence on the part of the carrier contributing thereto or aggravating the natural injuries resulting from car wear and necessary deprivation of water and food, is not to say that, where the carrier has been guilty of negligent delay and subjected the stock to the injurious effects of such transportation for an unreasonable and unnecessary length of time, and in consequence thereof the stock has been injured, though only in this natural way, to a greater extent than would have been the case had the delay not occurred, the carrier would not be responsible for whatever increased damage the stock has sustained on account of the delay, though such damage may be purely incident to keeping the animals on the car. To the contrary, we do not doubt the liability of the carrier for all damage that is referable to a negligent prolongation of the transportation through its natural effect upon the physical condition or latent vicious propensities of the animals, whereby they are reduced in weight or strength more than they would have been had

prompt carriage and delivery been made, and injure each other in consequence of viciousness, aroused by the excess of their confinement beyond the time necessary for transportation and delivery. These views will suffice to show the grounds of our opinion, that the trial court did not err in its rulings on charges having reference to this part of the case. The charges asked by the defendant were faulty in that they involved a tendency to mislead the jury, if indeed that was not their direct effect, from a consideration of any injuries which resulted to the stock from their nature, habits, and propensities in connection with and as operated upon by the negligent delay of the carrier. Charge 6 given for plaintiff correctly asserted the law in this connection. Charges 1, 12, and 4 refused to defendant were open to the objection pointed out above, if not to others also.

Charge 16 asked by defendant is in a sense abstract—there was no evidence that plaintiff was remiss in its efforts to repair the injuries sustained by the stock, if any, or that such injuries might have been lessened or cured by proper attention which was not given—and was affirmatively bad, in that it limits the recovery to nominal damages, though, for aught that is hypothesized, the plaintiff might well have been put to great trouble and expense in repairing the injury ³⁹⁷ which his property had sustained through defendant's negligence.

Charge 6 above referred to is not open to the objection urged in argument, which proceeds on the idea that there was evidence that twenty hours, or any number beyond ten or twelve, would be a reasonable time for the transportation from Birmingham to Atlanta. A witness for plaintiff testified that "usually stock in shipping go through very nicely in ten, fifteen, or twenty hours," but this evidence went to show that stock would not be injured on a journey lasting from ten to twenty hours on cars, and not that it was reasonably necessary for any length of time beyond ten or twelve hours to be consumed in the transportation from Birmingham to Atlanta.

We cannot see that the court committed any error in sustaining plaintiff's objection to the question put by defendant to the witness Camp. The form of the question was enough to support the objection, and, besides, the fact sought to be elicited was not relevant. If there was a custom for shippers of stock to accompany it, *non constat* but that this was a mere

privilege and not a duty of the shipper; and if the duty of the shipper in this instance, it does not appear that its performance would have avoided the injury, or that its remission contributed thereto.

The other exceptions to rulings on testimony are not urged in argument.

The judgment of the circuit court is affirmed.

CARRIERS—WHAT LAW GOVERNS CONTRACT OF.—The obligation of the shippers of a cargo to pay freight must be determined by the law of the place where the contract of affreightment was made: *China etc. Ins. Co. v. Forer*, 142 N. Y. 90; 40 Am. St. Rep. 576. The cases on this subject will be found collected in the notes to *O'Regan v. Cunard S. S. Co.*, 39 Am. St. Rep. 488, and *Hale v. New Jersey etc. Nav. Co.*, 39 Am. Dec. 406.

CARRIERS OF LIVESTOCK.—PRESUMPTION OF NEGLIGENCE: See the extended note to *Norris v. Savannah etc. Ry. Co.*, 11 Am. St. Rep. 361.

CARRIERS OF LIVESTOCK—LIABILITY FOR DELAY—MEASURE OF DAMAGES. In the case of partial loss of livestock, caused by the negligence of the carrier, the measure of damages is the difference between the price they would have brought in the market in the condition they would have been had the company exercised due care, less the freight and their value at such destination at the time of their arrival: *Missouri Pac. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 777; *Ayres v. Chicago etc. Ry. Co.*, 71 Mich. 372; 5 Am. St. Rep. 226, and note. See the note to *Murrell v. Pacific Express Co.*, 26 Am. St. Rep. 19, and the extended note to *Norris v. Savannah etc. Ry. Co.*, 11 Am. St. Rep. 366.

CARRIER OF LIVESTOCK—CUSTOM OF SHIPPER TO ACCOMPANY—EVIDENCE OF.—A custom requiring a shipper to go on the same train with his stock to feed and water them cannot be sustained, because the law imposes this duty on the carrier, and the latter cannot transfer it to the shipper by custom: *Missouri Pac. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776. See, also, the note to *Rixford v. Smith*, 13 Am. Rep. 53.

JASPER TRUST COMPANY v. KANSAS CITY, MEMPHIS, AND BIRMINGHAM RAILROAD COMPANY.

[99 ALABAMA, 416.]

CARRIERS—FALSE BILL OF LADING—RIGHTS OF BONA FIDE PURCHASER.—

One to whom a false bill of lading is indorsed and transferred by the person to whom it was issued, and who parts with value and becomes the innocent holder of it without notice, may hold the carrier issuing it responsible for the truth of its recitals, and for damages to the extent he may have advanced on the faith of its genuineness.

CARRIERS—FALSE BILL OF LADING—ESTOPPEL.—As between a railroad company issuing a false bill of lading and any one who shows himself a *bona fide* transferee and purchaser thereof, the corporation is estopped from denying that it received and holds the goods specified therein.

CARRIERS—FALSE BILL OF LADING—NEGOTIABILITY.—A false bill of lading, whether indorsed or not, is not a negotiable instrument.

CARRIERS—BILL OF LADING—WHO CAN TRANSFER.—A bill of lading can be transferred so as to vest title or right in the transferee only by the person to whom it is issued or by his authority. If transferred by an unauthorized stranger, the *bona fide* transferee cannot claim any damages from the carrier for the injury he may have suffered thereby.

CARRIERS—FALSE BILL OF LADING—BONA FIDE PURCHASER—DUTY AS TO INQUIRY.—A *bona fide* purchaser of a false bill of lading is put on inquiry as to the existence of the parties to whom it was issued, and his failure to so inquire and to obtain their indorsement is a bar to any claim for damages against the carrier issuing it.

CARRIERS—EXPRESS COMPANIES—LIABILITY FOR EMBEZZLEMENT BY AGENT. When one is induced through the fraud of an express agent to deliver money to an express company, to be carried and delivered to a fictitious person, and such company receives, receipts for, carries, and delivers the money to such agent who embezzles it, the sender may recover the amount sent from the express company.

EVIDENCE—EFFECT OF, WHEN IMPROPERLY ADMITTED.—The admission of irrelevant and immaterial evidence not affecting the result is not reversible error.

Coleman & Sowell and J. J. Altman, for the appellants.

W. Pratt and Hewitt, Walker & Porter, for the appellee.

420 STONE, C. J. These two cases are so intimately connected with each other that we will consider them together.

The Jasper Trust Company, located at Jasper, was engaged in banking. On the Kansas City, Memphis & Birmingham Railroad, distant from Jasper some sixty miles, is a railroad station known by the name of Sulligent, and the Southern Express Company has an office there. D. R. Sandford was depot agent of the railroad at that place, and was also agent of the express company, he filling both offices at that station. On September 9, 1890, D. R. Sandford, as agent of the railroad company, signed a bill of lading, using one of the railroad's blanks, by which he acknowledged to have received from R. H. Sandford & Co., thirty bales of cotton, weighing fifteen thousand pounds, in apparent good order, to be delivered to Barry, Thayer & Co., at Boston, Massachusetts. On the back of this bill of lading is this indorsement without date: "Deliver to Jasper Trust Co., R. H. Sandford & Co." The original bill of lading has been sent up under the trial court's order for our inspection. We find a very striking resemblance and similarity in the two signatures—D. R. Sandford to the bill of lading, and R. H. Sandford & Co. to the indorsement.

Soon after the issue of this receipt a draft was drawn on Barry, Thayer & Co., Boston, Massachusetts, bearing the signature of R. H. Sandford & Co., for a sum approximating the value of thirty bales of cotton, in favor of the Jasper Trust Company; and this draft, with the bill of lading attached and indorsed to it, as copied above, were forwarded to the trust company, and by it discounted. That company thereupon attempted to remit the proceeds of the draft, something over eleven hundred dollars, to R. H. Sandford & Co. at Sulligent; and to that end delivered the money to the Southern Express Company, taking its receipt and obligation to pay and deliver the same to R. H. Sandford & Co. Soon afterwards D. R. Sandford, the agent alike of the railroad ⁴³¹ and the express company, absconded, carrying with him said sum of money, together with other moneys obtained by similar practices.

A bill of lading acknowledging the receipt of the thirty bales of cotton to be shipped was false and fraudulent, no cotton in fact having been received. Nor was there such a firm as R. H. Sandford & Co. The entire transaction was planned and carried into effect by D. R. Sandford, the agent. He issued the false bill of lading; issued it to R. H. Sandford & Co., when there was no such firm or business house. He indorsed the pretended name of this fictitious firm on the bill of lading, to give it negotiability, and to enable him to consummate his fraudulent scheme. The money, consigned to this fictitious firm, in due course of business came to him as the express company's agent at Sulligent, and he did not deliver it to R. H. Sandford & Co. He could not, for they were a fiction.

The Jasper Trust Company instituted these two suits; the one against the railroad company for the nondelivery of the thirty bales of cotton. This suit, under the trial court's ruling, terminated in favor of the defendant. The facts were all agreed on, and, at the written request of the defendant, the railroad company, the court charged the jury that if they believed the evidence they should find for the defendant. They so found.

There can be no question that before February 28, 1881, the trust company was without right to maintain this action. Advancing money on a false bill of lading given by the railroad's agent would have placed them upon no higher ground than the person to whom it was improperly issued would

have occupied. It was in no sense a negotiable instrument: *Moore v. Robinson*, 62 Ala. 537.

On February 28, 1881 (Sess. Acts, 183), the act was approved "To prevent the issue of false receipts," etc. The principles of that statute have been carried into the code of 1886, commencing with section 1175. We quote from section 1179: "If any common carrier, not having received things or property for carriage, shall give or issue a bill of lading, or receipt, as if such things or property had been received, . . . such carrier . . . or person is liable to any person injured thereby for all damages, immediate or consequential, therefrom resulting."

An argument, prepared with great labor and research, has been submitted by the appellee. Its contention is that while D. R. Sandford was the accredited depot agent to execute bills of lading for freight to be transported on the railroad, ⁴²² he had no authority to execute such bills, unless the thing or merchandise to be transported was in fact received. That, as the cotton specified in the bill of lading was not received, Sandford transcended his delegated authority when he gave the receipt, and fastened no liability on the railroad company. This ingenious argument is followed by many citations of authority.

In the absence of our statute the foregoing argument would be conclusive. The bill of lading not being, in any sense, a negotiable instrument, the indorsee could assert no greater rights than the indorser could have asserted: 2 Am. & Eng. Ency. of Law, 241, and notes. The argument claims that our statute has wrought no change in this rule.

It seems to us that a full answer to this contention is found in the fact that such interpretation would practically annul that part of the statute which we have copied. Corporations are artificial entities or things, and can act only through human agency. Deny to them this agency, and they are left without power to do any act, or to achieve any result. The depot agent, in executing a bill of lading, is the railroad company speaking through him. His delegated power is restricted, it is true, for he is authorized to receipt for freight only when the freight is actually delivered to the railroad. But agents are sometimes false to their trusts, and injury to innocent outsiders is the consequence. It was this which rendered the statute under consideration necessary, and caused its enactment. The legislature realized that car-

riers or their agents might be negligently or intentionally derelict, and that damage, immediate or consequential, might result therefrom. To visit the loss thus occasioned on the carrier was simply placing the penalty where personal fault, or that of an agent, had caused the injury to be inflicted. Not to give the statute this interpretation is to deny to it all operation, when a corporation is the carrier. Its whole intention was to punish and prevent the giving of a bill of lading, when the property or thing was not in fact received for transportation; and if we limit the carrier's liability to cases in which the property or thing receipted for is actually received, do we not leave the statute without any purpose to be accomplished? Its language is: "Not having received things or property for carriage, shall give or issue a bill of lading or receipt, as if such things or property had been received." This makes the statute precisely applicable to the case we have in hand; and not to give it such construction would be to deny it all operation as against corporations.

423 Our statute was preceded by statutes on the same subject alike in England and in many of the states of this union: See them referred to in 2 Am. & Eng. Ency. of Law, 241, 242, and notes. It was enacted to prevent frauds, sometimes perpetrated through spurious bills of lading. It was not intended to make them negotiable instruments, like bills of exchange. Though transferable "by indorsement and delivery, it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue, or are intended to result from such negotiation." The statute must not "be construed as altering the common law, or as making any innovation therein, further than the words import": *Shaw v. Railroad Co.*, 101 U. S. 557.

A bill of lading, regular on its face and issued by a carrier or its authorized agent, is a certificate that the person to whom it is issued is the shipper of the property or the goods therein described, that they really exist, and are subject to the order and direction of the shipper, unless the bill of lading furnishes notice that such is not the fact. And our statute is authority for any one to deal with the person to whom such bill of lading is issued, on the basis and postulate that the property or goods in fact exist, are in the possession of the carrier, and subject to the conditions expressed in the bill of lading. Any one to whom such bill of lading is indorsed and transferred by the person to whom it was issued,

and who parts with value and becomes the innocent holder of it without notice, may hold the carrier responsible for the truth of its recitals, and for damages to the extent he may have advanced on the faith of its genuineness and truth as a bill of lading: Code of 1886, sec. 1179, last clause. As between the railroad company and any one who shows himself a *bona fide* transferee and purchaser of the bill of lading, the corporation is estopped from denying that it received and holds the cotton specified in the receipt.

Still, as we have said, such indorsed bill of lading is not raised to the elevated plane of bills of exchange and other negotiable instruments. A bill of exchange payable to a fictitious person may, under some circumstances, be negotiable, and the holder, if without notice and for value, may be protected against defenses, original or intermediate: 1 Daniell's Negotiable Instruments, sec. 136, et seq. This principle, however, cannot and does not apply to bills of lading. They are not transferable by delivery, and possession of them by any person, of whose ownership the writing furnishes no proof, raises no presumption of change of property in the ⁴²⁴ thing receipted for. The statute makes no express provision for their indorsement or transfer, but it is alike natural and reasonable that any one who claims to have succeeded to the ownership of the chattels or things expressed in the writing must furnish proof of such changed ownership. Indorsement will accomplish this. Who can indorse? Only the person to whom the bill of lading is given—the person the paper declares to be the owner and shipper, or his authorized agent. The power exists in no one else; and if any outsider, having no authority therefor, attempt to indorse or otherwise transfer it, no title or right to the property or things therein expressed is thereby transferred or encumbered. It is unlike a bill of exchange or negotiable note, which is perverted to a use other than that to which, by the terms of the agency, it was alone authorized to be applied: *Saltmarsh v. Tuthill*, 13 Ala. 390.

The question then comes up, Who can transfer a bill of lading, or encumber it, so as to vest a title or right in the transferee? Manifestly, this can be done only by the person to whom it is issued, or with his authority. If a stranger obtains unauthorized possession of it, and perverts it to unauthorized uses, no one who trusts such stranger, and parts with value on the strength thereof, can claim damages of the

carrier for the injuries he may thereby have suffered. It would be his own fault and folly if he dealt with one having no authority in the premises. He should have inquired.

The bill of lading in the present case was issued to a fictitious firm. There was no such company as R. H. Sandford & Co. That name indorsed on the bill of lading imported nothing, represented nothing. The Jasper Trust Company acquired no rights from R. H. Sandford & Co., for, being only an imaginary firm, it could neither have nor transfer rights. The bill of lading being drawn in favor of a person or firm having no real existence, how could it confer any rights on another? Manifestly, having no existence, it neither did nor could confer rights; neither did nor could indorse the bill of lading. And the Jasper Trust Company, acquiring no rights save those conferred on it by the indorsement, was necessarily put on inquiry as to who were R. H. Sandford & Co. That inquiry would have led to the discovery that there was in fact no such firm, but that it was a fiction and a myth. The railroad company has done the Jasper Trust Company no legal wrong of which the latter company can complain. Its failure to inform itself whether there was such firm as R. H. Sandford & Co.—its failure to obtain an indorsement⁴²⁵ of the bill of lading from the person or firm to which it was issued—is a bar to any claim of damages it may assert against the railroad company.

The second suit was against the express company, to recover the money intrusted to it. We have seen that the trust company, or bank, was made the victim of fraud and false pretense. No thirty bales of cotton were in fact delivered to the railroad company, and there was no such firm or company as R. H. Sandford & Co. If there had been such company, and the express company had delivered the package of money to it before notice given not to pay, then the express company would have performed its whole contract, and the trust company would be without remedy. Such is not this case: *Yarborough v. Wise*, 5 Ala. 292; *Wilson v. Sergeant*, 12 Ala. 778.

In the first of these cases—that of the Kansas City, Memphis & Birmingham Railroad Company—the facts were agreed on, and it was admitted there was no such firm as R. H. Sandford & Co. There was no agreement in the case against the express company as to what the facts were. It was tried on testimony adduced. We have examined the

transcript with care, and have narrowly scrutinized the testimony, all of which is set out in the bill of exceptions. The proof is full that D. R. Sandford, the agent, did all the writing and corresponding which purports to have been done in the name of R. H. Sandford & Co. The proof is quite full that there was no such firm as R. H. Sandford & Co., while there was not a semblance of proof that there was or ever had been such company. We make this statement, because it constitutes an important factor in pronouncing on one or more of the charges requested.

According to the testimony, if believed, the simple and naked facts of this case may be summarized as follows: Through the fraud and false pretense of D. R. Sandford the Jasper Trust Company was induced to deliver its money to the Southern Express Company to be carried and delivered to R. H. Sandford & Co., at Sulligent. The express company received and receipted for the package, carried it to Sulligent, where it was received by the express company's agent, and by him converted and embezzled. The express company has never performed the contract it entered into, by paying the money to R. H. Sandford & Co., or to any one else authorized to receive it. The present suit is brought to recover that money, as still constructively in the possession of the express company.

It is elementary law that if one, through mistake of fact, ⁴²⁶ false representation, or fraud, obtain money from another, an action lies to recover it back, on the simple principle that the one has money which *ex equo et bono* belongs to another: 2 Daniell's Negotiable Instruments, sec. 136, et seq.; Bishop on Contracts, sec. 226; 1 Parsons on Contracts, bottom p. 496; 3 Randolph on Commercial Paper, sec. 1485; *Rutherford v. McIvor*, 21 Ala. 750; 1 Brickell's Digest, 140, sec. 72; *Wilson v. Sergeant*, 12 Ala. 778. So, if money be transmitted through fraudulent procurement, and while the money is in transit the fraud is discovered and the bearer or carrier is notified not to deliver, then such bearer or carrier becomes the custodian of the money for the use and benefit of him who remitted it, and is liable to account to him therefor. But, after delivery, demand and notice come too late. The rule in such case is, to this extent, analogous to that which obtains in stoppages *in transitu*: 2 Am. & Eng. Ency. of Law, 855; Bishop on Contracts, sec. 802.

That part of the court's general charge to which exception

was reserved is in precise accordance with our views, and is free from error. For the same reason the first charge asked was rightly refused. The second charge asked was abstract, in that there was no testimony to support it. No testimony offered tended to show that D. R. Sandford was a member of the firm of R. H. Sandford & Co., or in fact that there was such firm. It was proved to be fictitious. This charge was rightly refused for this reason: 3 Brickell's Digest, sec. 106, p. 113. There is nothing in the other charges.

On the case made by the testimony, giving full weight to every thing claimed by defendant as in its favor, the trial court would have been justified in giving the general charge in favor of the plaintiff. Such being the case, we will not inquire specially into the court's rulings in receiving testimony offered by plaintiff. Whether some portion of it was material or not, it neither strengthened plaintiff's case in any material point, as shown by the unchallenged testimony, nor could it weaken the defense attempted to be made. In such conditions it is not a reversible error to receive illegal testimony: *Seymour v. Farquhar*, 93 Ala. 292, and authorities cited.

It is not intended, in what we have stated, to affirm that illegal testimony was received in this case. The fundamental fact on which plaintiff's right of recovery depended was D. R. Sandford's machinations, through which he deceived the Jasper Trust Company, and induced it to remit its money to the mythical R. H. Sandford & Co. Every step taken in that chain-work was part and parcel of the fraud he so successfully designed and perpetrated. It cannot be questioned ⁴²⁷ that every act done which contributed to the consummation of the particular wrong complained of in this case was material and pertinent testimony to go before the jury.

There is no error in either of the records, and each of the judgments must be affirmed.

COLEMAN, J., not sitting.

McCLELLAN, J., dissenting.

BILLS OF LADING—LIABILITY OF CARRIER TO BONA FIDE PURCHASER.—Where a carrier's agent issues a bill of lading for goods which were not delivered for shipment the carrier may show nonreceipt, even as against a *bona fide* transferee for value: *Black v. Wilmington etc. R. R. Co.*, 92 N. C. 42; 53 Am. Rep. 450, and extended note. Where the agent of a railroad, having authority to sign bills of lading, fraudulently signed and issued a

bill of lading for goods never received for transportation, the company will not be liable thereon to a consignee therein for advances made on the faith of such a bill: *Baltimore etc. R. R. Co. v. Wilkens*, 44 Md. 11; 22 Am. Rep. 26. The contrary doctrine is maintained in *Bank v. New York etc. R. R. Co.*, 106 N. Y. 195; 60 Am. Rep. 440. A railroad company is estopped as against a *bona fide* purchaser to deny a bill of lading issued by its authorized agent, although the goods were not received by the company: *Sioux City etc. R. R. Co. v. First Nat. Bank*, 10 Neb. 556; 35 Am. Rep. 488, and note. See the extended note to *Chandler v. Sprague*, 38 Am. Dec. 410, 422.

BILLS OF LADING, FALSE—NEGOTIABILITY OF.—No title can be transferred by a fraudulent holder of a bill of lading to the property described in the bill, by an indorsement of the bill, to a purchaser for value, who has notice of the fraud: *Decan v. Shipper*, 35 Pa. St. 239; 78 Am. Dec. 334. A bill of lading fraudulently made, whereby the goods of one person are shipped to or in the name of another, without the consent of the former, will not enable the latter to transfer the goods, even to an innocent purchaser for value: *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541, and note.

BILLS OF LADING, BY WHOM MAY BE TRANSFERRED.—A bill of lading is only negotiable in the sense that its true owner may transfer it by indorsement or assignment so as to vest the legal title in the transferee: *Douglas v. People's Bank*, 86 Ky. 176; 9 Am. St. Rep. 276. See, also, the note to *Missouri Pac. Ry. Co. v. Heidenheimer*, 27 Am. St. Rep. 869, and the extended note to *Weyand v. Atchison etc. Ry. Co.*, 9 Am. St. Rep. 512, and *Chandler v. Sprague*, 38 Am. Dec. 422.

JONES v. WEAKLEY.

[99 ALABAMA, 441.]

GIFTS—CAUSA MORTIS OR INTER VIVOS.—To constitute a valid gift *inter vivos* or *causa mortis*, the donor must part with the dominion of the property given, and his acts showing his intent to so part with the dominion must be as pronounced and decisive as is possible with the subject matter of the gift.

GIFTS CAUSA MORTIS—SAVINGS BANK BOOK.—The delivery of a savings bank book by its owner to a donee is a valid gift *causa mortis* if such is the intention of the donor.

GIFTS CAUSA MORTIS—PASS-BOOK OF ORDINARY BANK OF DEPOSIT.—The delivery, by the donor to the donee, of a pass-book of an ordinary bank of deposit only is not sufficient to perfect a gift *causa mortis* of the money on deposit, since a check, and not the book, is the best delivery, and the depositor by delivery of the book does not lose control and dominion over the deposit, and may still check against it.

White & Howze, for the appellant.

Cabaniss & Weakley, for the appellee.

443 STONE, C. J. This case was tried by the court without a jury, and presents a single question: Does the testimony

prove that the deceased, Nat Jenkins, made a valid, executed gift *causa mortis* to John H. Jones, the plaintiff, of the money he had on deposit with the First National Bank of Birmingham? There is no material conflict in the testimony.

The First National Bank of Birmingham was a bank of issue, discount, and deposit, and was not a savings bank. Nat Jenkins was a colored man, was lying seriously wounded from a railroad disaster, believed he would die of his wounds, and did, in fact, die therefrom two days afterwards. He had a deposit account with the First National Bank. He had in his possession a pass-book, in which was an account with the caption, "Dr., The First National Bank in account ~~444~~ with Nat. Jenkins, Cr." In this pass-book were items of debit and credit, but the account was not balanced. There was, in fact, a balance due the depositor of near nine hundred dollars.

Jones was nephew of Jenkins, and was visiting the latter as he lay in the hospital, from the effect of his injuries. He gave Jones the key to his box, and requested him to go and bring to him his pass-book and other articles. On the next day, and in the presence of witnesses, Jenkins, after stating he was going to die, "handed to plaintiff (Jones) the bank-book, keys, and papers, and said to him: . . . Take this book. I give you this money and all I have got; go and get it. I don't want the old man, or any of his folks, to have any thing that I have got. All I want is for you to see that I am decently buried." Jones took possession of the tendered pass-book, keys, and papers, and retained them. After Weakley was appointed administrator he checked the money out of the bank, and this action was brought by Jones to recover the same as so much money had and received for his use.

The general rule is, that to constitute a valid gift, whether *inter vivos* or *causa mortis*, the donor must part with dominion over the thing attempted to be given, must do the act or acts which are, or appear to be, the most pronounced and decisive of the intention to part with possession and control; and the acts must of themselves amount to a parting with the possession and control. Authorities on this question are very abundant, and they cover almost every conceivable phase of the question: *McHugh v. O'Connor*, 91 Ala. 243; *Dacus v. Streety*, 59 Ala. 183; 8 Am. & Eng. Ency. of Law, 1341, et seq., and the numerous authorities cited by counsel.

The direct question presented by this record has been many times considered. A pass-book issued by a savings bank, it is held, rests on a peculiar footing. Such book is the record of the customer's account, and its production authorizes control of the deposit. Like the key of a locked box, its delivery is treated as a delivery of all it contains. It follows that the delivery in this case, accompanied by the declared intention to give, if the deposit had been in a savings bank, would have been a valid gift *causa mortis* of the money on deposit, of which it was the evidence. It would furnish the key to the locked contents: 8 Am. & Eng. Ency. of Law, 1824, 1825; *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425; 37 Am. Rep. 371; *Curtis v. Portland Savings Bank*, 77 Me. 151; 52 Am. Rep. 750; *Hill v. Stevenson*, 63 Me. 364; 18 Am. Rep. 231; *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39.

Not so, however, with the present book. The First National Bank, as we have seen, was a bank of issue, discount, and deposit. The money could be withdrawn from the bank, not by the production of the pass-book, but on the check of the depositor. It was not the best delivery available under the circumstances. It did not give dominion and control of the money, the thing claimed to have been given; for the money was as subject to check without the production of the book as with it: *Thomas v. Lewis*, 89 Va. 1; 37 Am. St. Rep. 848; *Dole v. Lincoln*, 81 Me. 422; *Hillebrant v. Brewer*, 6 Tex. 45; 55 Am. Dec. 757; *Noble v. Smith*, 2 Johns. 52; 3 Am. Dec. 399; *Jones v. Brown*, 34 N. H. 445; *Beak v. Beak*, L. R. 13 Eq. Cas. 489; 8 Am. & Eng. Ency. of Law, 1845, note 2.

There is no error in the record.

Affirmed.

GIFTS CAUSA MORTIS OF BANK-BOOK—WHETHER SUFFICIENT.—A gift *causa mortis* of a bank-book showing the amount on deposit by the donor is not a sufficient gift of the sum so deposited: *Thomas v. Lewis*, 89 Va. 1; 37 Am. St. Rep. 848, and note, with the cases collected. See, also, the extended notes to *Crook v. First Nat. Bank*, 35 Am. St. Rep. 26, and *Sheedy v. Roach*, 26 Am. Rep. 684.

GIFTS CAUSA MORTIS—SUFFICIENCY OF DELIVERY GENERALLY: See *Thomas v. Lewis*, 89 Va. 1; 37 Am. St. Rep. 848, and note, with the cases collected.

McCALLEY v. OTEY.

[99 ALABAMA, 584.]

MORTGAGES—POWER OF SALE—INJUNCTION—TENDER.—A court of equity may enjoin the execution of a power of sale contained in a mortgage when the mortgagee is proceeding in an improper or oppressive manner, or is perverting the power from its legitimate purpose, as when, having refused repeated tenders, he files a bill to foreclose, dismisses it without prejudice when the case is ready for hearing, and advertises the land for sale under a power in the mortgage, with the avowed purpose of compelling the payment of another claim which is disputed.

TENDER—EFFECT OF—WHEN ACTUAL TENDER UNNECESSARY.—A tender of the whole sum due, principal and interest, at any time after the debt falls due, but before suit is brought, stops the interest and discharges the party from the costs of a subsequent suit; and actual tender of the money is dispensed with if the debtor is ready and willing to pay, and about to produce it, but is prevented by the creditor declaring he will not receive it.

TENDER.—PAYMENT OF MORTGAGE DEBT INTO COURT IS NOT NECESSARY in order to maintain a bill in equity filed by the mortgagor to redeem and to enjoin the execution of a power of sale contained in the mortgage, when tender has been made and refused, and at all times been kept good after it was made.

TENDER MADE AND REFUSED, TO STOP INTEREST, must be of the exact amount due, and must be kept good and ready at all times to be paid to the creditor upon his demand, and on plea must be followed by the payment of the money into court.

TENDER—DENIAL OF—BURDEN OF PROOF.—When the making of a tender is denied the burden of proof is on the debtor, who seeks to avail himself of the benefit of the tender, to show that he was ready all the time after the tender was made, and willing to pay the amount tendered upon the demand of the creditor.

BILL in equity by Mrs. O. A. Otey and her children against C. S. McCalley and others, to enjoin a threatened sale of land under a power contained in a mortgage, and praying to be allowed to redeem said land. The mortgage was executed August 6, 1876, by Mrs. Otey, and was given to secure the payment of money borrowed by her from Miss Ford, who subsequently married W. J. McCalley. Said Mrs. McCalley survived her husband and bequeathed her property, including the mortgage in suit, to Martha T. Russell. In September, 1884, the parties ascertained that fourteen hundred and eighty dollars and seventy-six cents were due on the mortgage, and Miss Russell then agreed to take twelve hundred dollars in full satisfaction thereof. Mrs. Otey then applied to C. S. McCalley to advance this amount for her and take the mortgage as security. This he did, and in consideration therefor Mrs. Otey agreed to pay him annually the legal rate of inter-

est on fourteen hundred and eighty dollars and seventy-six cents until January 1, 1888, he to then surrender the mortgage to her on her payment of twelve hundred dollars. The bill alleged the payment of interest as stipulated until December 31, 1887. Tender on that day of twelve hundred dollars and interest for one year on fourteen hundred and eighty dollars and seventy-six cents. Refusal of that tender by defendant as well as of subsequent like tender made January 2, 1888, and in July, 1889. On July 2, 1888, McCalley filed a bill in equity against Mrs. Otey to foreclose said mortgage. After answer and proof, and on July 22, 1889, McCalley dismissed his bill without prejudice and advertised the lands named in the mortgage for sale, under a power contained therein. Said sale was not for the purpose of collecting the debt secured by the mortgage, but for the purpose of coercing the payment of another fictitious claim of debt against Mrs. Otey. The defendants by answer in the present suit denied the sufficiency of the tender alleged in the bill. Judgment for the plaintiffs in accordance with the prayer of the bill and that no interest should be charged on the mortgage debt from the time of the tender made December 31, 1887. Defendants appealed.

R. C. Brickell and L. Cooper, for the appellants.

T. Betts, for the appellees.

588 COLEMAN, J. When this case was here on a former appeal (90 Ala. 302) the equity of the bill was fully sustained, and it was held that a court of equity would enjoin the execution of a power of sale when it appeared that the mortgagee was proceeding in an improper or oppressive manner, or was perverting the power from its legitimate purpose; as where, having refused repeated tender, he files a bill to foreclose, dismisses it without prejudice when the cause was ready for hearing, and advertises the land for sale under a power in the mortgage with the avowed purpose of compelling the payment of another claim which is disputed: *McCalley v. Otey*, 90 Ala. 302; *Struve v. Childs*, 63 Ala. 473. The evidence reasonably satisfies us that a tender was made in December, 1887, of the full amount due, of the refusal to accept it, and an attempt, after the tender, on the part of the mortgagee, to coerce the payment of a disputed claim, not embraced in the mortgage debt. In addition to the testi-

mony offered by complainant on this question, the respondent, John S. McCalley, testifying in regard to the tender made by John M. Hampton, says: "I refused to take it from him unless he paid also Mrs. Octavia A. Otey's merchandise account." The merchandise account constituted no part of the secured debt, and its correctness was controverted.

The present bill was filed on the 19th of July, 1889. It appears from the testimony of the witness Hampton that a tender of the same amount was made about the 1st of July, just before the present bill was filed, and refused upon the same grounds as that admitted by the respondent, above referred to. After answer and demurrer to the bill, complainants amended their bill, on the twenty-first day of March, 1890, by averring a readiness and willingness to pay the debt ever since the thirty-first day of December, 1887, when the debt fell due, and a tender of the money was first made.

The only other assignment of error which we think it necessary to consider applies to so much of the decree of the court as denied to the respondent any interest upon his ~~500~~ debt. A tender of the whole amount due, principal and interest, at any time after the debt falls due, but before suit is brought, estops the interest, and discharges the party from the cost of a subsequent suit. The actual proffer of the money is dispensed with if the debtor is ready and willing to pay, and about to produce it, but is prevented by the creditor declaring he will not receive it: *Rudolph v. Wagner*, 36 Ala. 702. In *McCalley v. Otey*, 90 Ala. 302, it is said: "A tender refused does not operate to discharge the debtor from the debt, but only releases him from the payment of the interest subsequently accruing; and to have this effect the amount tendered must be in readiness to be paid at any time called for, and on plea must be followed by the payment of the money into court. It is not meant, however, that the identical money tendered must be kept; it is sufficient if the party holds himself ready to pay at all times."

We have already held that the payment of the money into court was not necessary to sustain the equity of the bill for redemption, nor was its payment into court essential, under the facts of the case, to authorize a court of equity to enjoin the execution of a power of sale: *McCalley v. Otey*, 90 Ala. 302; *McGuire v. Van Pelt*, 55 Ala. 344; *Carlin v. Jones*, 55 Ala. 624. We are considering now the question of a tender

as affecting the payment of interest. Unless the tender is kept good all the time, that is, unless the debtor is willing and prepared to make payment at any time after the tender, if the creditor should conclude to receive it, and until the money is paid into court upon his plea, the debtor is chargeable with interest. He cannot make a tender to-day and then use the money for his profit, and escape the payment of interest. He is released from the payment of interest upon the supposition that he has been deprived of the use of the money, by holding himself in readiness all the time to pay his creditor upon his demand. The burden to make this proof, when the tender is denied, rests upon the debtor who seeks to avail himself of the benefit of a tender. The answer of the respondent creditor expressly denied the averment of complainant's bill that he was ready all the time and willing to pay the amount tendered: *Thayer v. Meeker*, 86 Ill. 474; *Moynahan v. Moore*, 9 Mich. 9; 77 Am. Dec. 468, note 485; 7 Wait's Actions and Defenses, 596, sec. 17. The case of *Curtiss v. Greenbanks*, 24 Vt. 536, is directly in line with *McCalley v. Otey*, 90 Ala. 302, that the "identical" money need not be kept on hand, and it lays down the general principle as we have declared it, that he must be ready and willing at all times to make good his tender. ⁵⁹⁰ That case, *Curtiss v. Greenbanks*, 24 Vt. 536, does not treat of the question of the burden of proof.

The chancellor was of opinion that the proof sustained the averments of the bill as amended. We have examined the testimony very closely, and we fail to discover any proof tending to show that complainant kept good the tender. We think it satisfactorily shows a tender on the 31st of December, 1887, and another of the same amount on the 2d of January, 1888, and another about the 1st of July, 1889, and that the amount previously tendered was paid into the court at the time the amendment to the bill was filed in March, 1890. There is no proof that the tender was kept good, that is, a readiness to pay, as we have defined a valid tender, in the intervals from January 2, 1888, to July, 1889, and from this latter period to March, 1890, when the money was paid into court. We do not think the evidence sufficient on this point, and hold that the chancellor erred in decreeing that respondent mortgagee was not entitled to any interest. In all other respects his decree is affirmed. We will not render any final decree here, but reverse and remand the cause, leaving it in the discre-

tion of the chancery court to permit the taking of further testimony on this point, if deemed essential to promote the ends of justice.

Reversed and remanded.

STONE, C. J., dissenting. I cannot agree that in passing on the issue of tender, the law casts on him who pleads such defense the duty and burden of proving that he has at all times kept on hand the amount of money he claims to have tendered; and that failing to do so, the plea is not made good.

I think the sounder and better rule is, that if the tender is made sufficient in amount, and when the tender is pleaded the money is produced and deposited in court, this is all the defendant need do, unless by a further act of the creditor he has been put in default. The person to whom a sufficient tender has been made and refused by him may destroy the effect of such tender by subsequently demanding the money tendered. If, on such subsequent demand, the debtor fails to pay the money he thereby loses all benefit the tender had secured to him. He must have the money ready to pay when called on, and must pay it if called on. This is what I understand to be the proper meaning and extent of the maxim that the tender must be kept good. He must have the money when needed and called for. He need not have it between the time of the tender ⁵⁹¹ and the filing of the plea, unless it is called for. The law should not require a useless thing.

There are authorities both ways on this question. I think the sounder and more reasonable theory, the one which will secure a mutually just administration of the law, is the one I have sketched. In *Curtiss v. Greenbanks*, 24 Vt. 536, the principle is thus stated: "The person tendering is at liberty to use it [the money tendered] as his own. All he is under obligation to do is to be ready at all times to pay the debt in currency when requested." To the same effect are *Colby v. Stevens*, 38 N. H. 191; *Michigan Cent. R. R. Co. v. Dunham*, 30 Mich. 128; 7 Wait's Actions and Defenses, 592. There is, to my mind, a sound, logical reason for this. The tender does not change the ownership of the money. It remains the property of the tenderer until accepted, or agreed to be accepted, or until it is deposited in court with the plea, when it passes into the custody of the court. He remains liable for its safe preservation. To me it is illogical to hold that one who is in every sense the owner of money may not use

and utilize it, provided he thereby impairs the legal rights of no other person.

TENDER—SUFFICIENCY OF TO STOP INTEREST.—A tender which is not kept good does not have the effect of stopping interest: *Thornburgh v. Fish*, 11 Mont. 53. See the extended note to *Moynahan v. Moore*, 77 Am. Dec. 485.

TENDER WHEN NOT NECESSARY.—A refusal to deliver property placed exclusively on a ground other than the nonpayment of charges on it amounts to a waiver of tender of such charges: *Tarbell v. Farmers' etc. Elevator Co.*, 44 Minn. 471. Where one party by his act renders a tender useless the other party is not required to make the tender: *Chinn v. Bretches*, 42 Kan. 316; *Lea v. Banis*, 6 Houst. 433. See the notes to *Renard v. Olink*, 30 Am. St. Rep. 460, and *Bmlen v. Lehigh Coal etc. Co.*, 86 Am. Dec. 520; and the extended note to *Moynahan v. Moore*, 77 Am. Dec. 488.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

ROBINSON v. EXEMPT FIRE COMPANY.

[108 CALIFORNIA, 1.]

CONTRACT, WHEN SEVERABLE.—A contract or obligation of a beneficial association to pay its members sick benefits of a designated sum each week is severable and not entire. Therefore, a default in the payment of such benefits does not entitle the member in a single action to recover the damages which he may sustain for defaults occurring after the commencement of the action.

BENEFICIAL ASSOCIATION—SICK BENEFITS ACCRUING AFTER THE COMMENCEMENT OF THE ACTION.—In an action by a member of a beneficial association, who, by the laws of such association, is entitled to sick benefits of a specified sum for each week during which he is sick or disabled, he can recover such benefits accruing to him up to the time of the trial, but is limited to the sum due when his action was brought, though the moneys becoming due pending the action resulted from his disability from the same cause whose operation entitled him to the benefits sued for.

EVIDENCE—OPINIONS OF WITNESS, QUESTION NOT OBJECTIONABLE AS CALLING FOR.—A witness who saw the plaintiff on a specified occasion may be asked whether or not he was apparently well. The witness, though not an expert, should be permitted to state the result of his observation as to the state of a person's health or other characteristic or state which manifests itself to the apprehension of a common observer, notwithstanding the statement of the witness involves his opinion or judgment.

STIPULATION.—A COURT MAY IN ITS DISCRETION RELIEVE a party from the effect of a stipulation submitting a cause on motion for a nonsuit.

Davis Louderback, for the appellant.

George D. Collins, for the respondent.

² **VAN FLEET, J.** The defendant and appellant is an organization with certain fraternal and charitable features,

whose membership is composed of exempt firemen. Its by-laws provide for the payment of sick benefits to any member who, from sickness or accident, becomes unable to earn a livelihood. The plaintiff, a member of the organization, brings this action to recover a considerable amount claimed to be due him for sick benefits, and which defendant refused to pay.

Trial was had before a jury, and verdict and judgment went for plaintiff. From the judgment and an order denying its motion for a new trial defendant appeals.

1. The action was commenced in November, 1885, but was not tried until November, 1893. At the trial the court, against the objection of defendant, admitted evidence offered by plaintiff upon the theory that plaintiff was entitled to recover for benefits accruing intermediate the commencement of the action and the date of trial; and the court also charged the jury in accord with this theory, and refused an instruction requested by defendant limiting the plaintiff's right to recover to the benefits accrued at the date of commencing his action, to all of which defendant excepted. These rulings, we think, were clearly erroneous. The idea upon which the lower court seems to have proceeded and the contention of defendant is, that the contract sued on is entire and not severable; that it imposed a duty upon defendant to pay benefits so long as plaintiff remained sick and disabled; that the defendant³ having made default before suit, this default worked a breach of the entire contract, and that all damages accruing subsequently from that sickness must be deemed to have originated in the default, to have proximately resulted therefrom, and can be recovered in the action, although accruing subsequently to its commencement. But we think respondent mistaken as to the character of the contract between the parties. The contract is not entire in the sense as used by respondent. It is, to the contrary, in its nature severable. It requires defendant to pay plaintiff a certain sum each week that he is sick and disabled. The right of plaintiff to this payment for any one week accrues at the end of that week, and he is entitled to sue immediately upon default in its payment. Such default, however, does not work a breach of the entire contract; the contract still subsists as to future benefits, and the default only affects the rights of the parties as to the benefit accrued. It is obvious that it does not work a breach as to the future benefits, since, as to

such, the liability of the defendant has not become fixed, but remains contingent upon the condition of the plaintiff being such as to entitle him to demand them. The accidental circumstance that the plaintiff in this instance continued disabled from the same cause subsequent to the bringing of his action, and that defendant continued to default in payment of benefits, can in no way affect the construction to be put upon the contract. Each default was a separate cause of action in itself, and the damage accruing to the plaintiff therefrom did not flow proximately or otherwise from any previous default. The successive defaults of the defendant, and the damage resulting to plaintiff from each, were as separate and apart as though arising from entirely distinct and widely separated causes of disability. Mr. Parsons, speaking on the subject of the rule of damages applicable to a contract that is severable into parts, says:

"It may happen that the injury complained of is the ⁴ breach of a contract that extends over a considerable space of time, and includes many acts, or it is a tort divisible into many parts. The question then arises whether the action should be for the whole breach or the whole tort, and damages be given accordingly. This must depend upon the entirety of the contract or of the tort. If it be a whole, formed of parts, which are so far inseparable that if any are taken away there is no completed breach or tort left, all must be included in the demand and in the damages. But if they are separable into many distinct breaches or torts, then an action may be brought as if each stood alone, and damages recovered": 3 Parsons on Contracts, c. 8, sec. 6.

This we take to be a correct statement of the rule. If the default of defendant in the payment of any one week's benefits carried with it a breach of the whole contract, defendant could sue for and recover all damages proximately flowing from that breach; and this is the extent to which the authorities relied upon by respondent go. But the contract being separable, as we have seen, and not entire, plaintiff is only entitled to recover those benefits accrued at the commencement of the action.

2. It became a subject of material inquiry at the trial as to the state of health of plaintiff during the period for which he claimed benefits, the main defense of defendant resting upon its denial of the sickness or disability of plaintiff. Many witnesses were examined upon the subject, and a large num-

ber of exceptions are urged by defendant to rulings of the court in excluding evidence. The rulings complained of are all upon one general feature of the evidence, that is, as to the physical appearance and apparent state of health of plaintiff. It would not conduce to brevity nor subserve any useful purpose to notice these rulings in detail; many of them were correct, but some we deemed erroneous. Of the latter, one instance will serve to point the rule which should be observed by the lower court on a new trial: ⁵ A witness who knew plaintiff quite intimately and saw him frequently, and had conversations with him about his health during the period covered by his claim against defendant, was asked this question: "Well, now, when you saw him on these occasions walk along, when he noticed you, was he, or was he not, apparently well"? Plaintiff objected to the question as calling for the opinion of the witness, and the objection was sustained. We think the question was competent, and should have been allowed. It is true, as contended by respondent, that, in a certain sense, the question tended to elicit the opinion of the witness, but it called at the same time for the fact of the plaintiff's physical appearance, as a result of the witness' observation, and that fact the party was entitled to lay before the jury. There are many cases where a witness, though not an expert, may be permitted to state the result of his observation, notwithstanding it involves, in a sense, his opinion or judgment, such as the apparent state of health of a person, whether a person is drunk or sober, or other characteristic or state which manifests itself to the apprehension of the common observer: ³ Rice's Evidence, sec. 93, p. 142. It is sometimes difficult to distinguish between that which is purely matter of opinion, and so not admissible, and that which partakes of the nature of a fact by reason of being the result of personal contact and observation by the witness, but this difficulty does not, in any sense, militate against the rule. There are many matters of importance to the investigation of truth that could not be established or presented to the jury if this were not the rule. In *City of Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321, it was held that the fact of disease, when perceptible to the senses, may be testified to by any witness. So, in the case of *Parker v. Boston etc. Steamboat Co.*, 109 Mass. 449, the plaintiff sued a common carrier for personal injuries, and, on the trial, her daughter was permitted ⁶ to testify that her mother "was decidedly worse

than she was two months after the accident." The testimony was held proper, the court saying:

"The witness had the means of observing the plaintiff from time to time, and her testimony was as to facts within her observation, and not a mere expression of opinion reached by a process of reasoning and deduction. She stated what she saw—that the plaintiff was not able to do as much work, and was not as well as she was two months after the accident."

The same principle has been upheld in this state in a number of cases: See *People v. Lavelle*, 71 Cal. 351; *People v. Wreden*, 59 Cal. 392; *Estate of Carpenter*, 94 Cal. 416. In the instance stated, and several others of like character, we think the court should have allowed the evidence.

3. The court did not err in relieving plaintiff from the effect of his stipulation submitting the case on motion for nonsuit, and allowing him to file an amended complaint. It was a matter purely in the discretion of the court, and, upon the showing made, we cannot say the discretion was abused: *Ward v. Clay*, 82 Cal. 502. Neither did the court err in its ruling as to the statute of limitations, nor on the doctrine of *ultra vires*. As to the latter question, we are satisfied that the objects contemplated by, and provided for, in the by-laws are clearly within the language of the act conferring upon defendant control of the fire department charitable fund.

We have carefully examined the record, and find no other error.

For the reasons above given, the judgment and order denying a new trial are reversed, and the cause remanded for a new trial.

HARRISON, J., and GAROUTTE, J., concurred.

Hearing in Bank denied.

CONTRACTS.—WHEN SEVERABLE AND WHEN ENTIRE: See *Fullmer v. Post*, 155 Pa. St. 275; 35 Am. St. Rep. 881, and *Coleman v. Insurance Co.* 49 Ohio St. 310; 34 Am. St. Rep. 565, and the notes thereto, in which the cases discussing this subject are collected.

WITNESSES—OPINIONS OF AS EVIDENCE.—The mere opinion of a witness is not a statement of fact, and is not admissible in evidence: *Brinkley v. State*, 89 Ala. 34; 18 Am. St. Rep. 87; *Moses v. State*, 88 Ala. 78; 16 Am. St. Rep. 21; *Tillery v. State*, 24 Tex. App. 251; 5 Am. St. Rep. 882, and note; *People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851; *Lewis v. State*, 96 Ala. 6; 38 Am. St. Rep. 75. See the note to *Hodge v. State*, 38 Am. St. Rep. 149, 150, and the extended notes to *Commonwealth v. Sturtivant*, 19 Am. Rep. 410, and *Baltimore etc. Turnpike Co. v. Cassell*, 59 Am. Rep. 176.

SAN FRANCISCO v. ANDERSON.

[108 CALIFORNIA, 69.]

TAXATION.—A SEAT IN A STOCK OR EXCHANGE BOARD is not taxable property, if such seat is merely the personal privilege of being and remaining a member of a voluntary association with the assent of the associates, and such privilege is not transferable without the assent of the association, and all its property is assessed to it for the purposes of taxation.

Jarboe & Jarboe and Edward R. Taylor, for the appellant.

J. E. O'Donnell and H. Jones, for the respondents.

¶ McFARLAND, J. The only question in this case is whether or not a "seat in the San Francisco Stock and Exchange Board" is taxable property, and in our opinion it is not.

What such a "seat" is sufficiently appears in the opinion of this court in *Lowenberg v. Greenebaum*, 99 Cal. 162; 37 Am. St. Rep. 42. In that case we held that a seat in said board, being merely "a personal privilege of being and remaining a member of a voluntary association with the assent of the associates," was not property that would pass by a sale under a common writ of execution; and following the views there expressed we hold that it has no such qualities as make it assessable and taxable as property. It is a mere right to belong to a certain association with the latter's consent, and to enjoy certain personal privileges and advantages which flow from membership of such association. Those privileges and advantages cannot be transferred without the consent of the association, and a forced sale of them would not give to the purchaser the right to occupy said "seat." It is too impalpable to go into any category of taxable property. Respondent cites *Clute v. Loveland*, 68 Cal. 254, but that case went upon the theory that the "seat" of a member of the said stock board represented his interest in the property of said board, and in the property of a certain corporation called the Company of Associated Stockholders, with which said stock board had certain relations. Now, the alleged taxes for which this suit was brought were for the fiscal year 1889, and the stipulated facts show that for said year "all the real and personal property owned by, or in the possession, or under the control" of, said San Francisco Stock and Exchange Board, and of said Company of Associated Stockholders, were duly assessed to said board and said

company, and that all taxes levied to pay the assessments were by said board and said company fully paid. Therefore, under the theory of the said case invoked by respondent, the attempt to tax said "seat" in addition to the taxes levied upon all the property of said stock board and said corporation was clearly an attempt at double taxation, and void within the principle of the case of *Burke v. Badlam*, 57 Cal. 594.

The judgment and order denying appellant's motion for a new trial are reversed.

DE HAVEN, J., and FITZGERALD, J., concurred.

PERSONAL PROPERTY—EXECUTIONS.—SEAT IN STOCK EXCHANGE WHETHER SUBJECT TO: See *Lowenberg v. Greenbaum*, 99 Cal. 162; 37 Am. St. Rep. 42, and *Habenicht v. Lissak*, 78 Cal. 351; 12 Am. St. Rep. 63, and note.

ALLEN v. POCKWITZ.

[108 CALIFORNIA, 85.]

VENDOR AND PURCHASER—ATTORNEY'S REJECTION OF TITLE.—If a contract for the sale of real property provides that the title is to be examined and accepted or rejected by the purchaser's attorney, the action of such attorney in rejecting the title is final, and the purchaser cannot be compelled to accept it on the ground that it is perfect and marketable.

Sidney V. Smith, and Smith, Wright & Pomeroy, for the appellant.

Reinstein & Eisner, for the respondent.

¶ The COURT. On June 21, 1889, the plaintiff, personally, and defendant, through the agency of David Stern and Son, real estate brokers, executed the following written instrument:

"SAN FRANCISCO, June 21, 1889.

"Received from John De Witt Allen the sum of one thousand (\$1,000) dollars, being deposited on account of thirty-five thousand (\$35,000) dollars, U. S. gold coin, the purchase price of the property this day sold to him, situated in the city and county of San Francisco, state of California, and described as follows, to wit:

"Lot and improvements situated on the northeast corner of Van Ness and Ash avenues, 58 feet on Van Ness avenue by 100 feet on Ash avenue.

"Terms of sale: 21 days are allowed to examine title and consummate sale. At the termination of said time the balance of said purchase money is due and payable upon tender of the deed of the property sold.

"Title to be examined and accepted or rejected by J. De Witt Allen's attorney. Abstract to be run down to date; \$150 to be allowed for attorney's fees. Mortgage to be released and to be free and clear from all encumbrances. Taxes to be paid to July 1, 1889.

"If the sale is not consummated in accordance with the foregoing conditions the deposit to be forfeited.

"DAVID STERN AND SON, Agents.

"Agreed to: JOHN DE W. ALLEN."

The plaintiff submitted the abstract of the record title to his attorney, Sidney V. Smith, who was a reputable attorney at law, and practicing as such in San Francisco, for examination, and to be accepted or rejected by him according to the above agreement. He rejected the title as to an undivided one-third part of the lot, for reasons stated by him in writing, and duly communicated ⁸⁷ to defendant and to David Stern and Son. Thereupon plaintiff demanded a return of the one thousand dollars deposited, which in the mean time had been delivered to defendant. The defendant refused to return the deposit, tendered to plaintiff a deed for the lot, and demanded the balance of the purchase money, claiming that the title was perfect notwithstanding it had been rejected by plaintiff's attorney. Thereupon plaintiff brought this action to recover the deposit of one thousand dollars with interest.

The judgment was in favor of the plaintiff; but, on motion of the defendant, a new trial was granted, and this appeal by plaintiff is from the order granting a new trial.

It is not claimed that the written agreement was for an unconditional sale, but the parties disagree as to what were intended to be the conditions upon which plaintiff would be bound to "consummate the sale," by payment of the balance of the purchase money. The appellant contends that one of the conditions of his obligation to consummate the sale was that his attorney should accept, and not reject, the record title, while the respondent contends that the only conditions intended were that the title should appear to be a good, marketable title, and that defendant should tender a sufficient deed to convey such title. They also disagree as to

whether or not defendant's title was in fact a good, marketable title, but, in our view of the case, this question becomes immaterial, and upon it we express no opinion.

Our understanding and construction of the agreement is, that unless plaintiff's attorney accepted, and did not reject the title, the plaintiff was not bound to consummate the sale. This, if not fully expressed, is fairly inferable from the language of the contract, otherwise no meaning or purpose whatever can be attributed to a considerable portion of that language. For what purpose were twenty-one days allowed for examination of title and consummation of sale? Of what importance ⁸⁸ was an "abstract of title run down to date"? Why was the "title to be examined" by plaintiff's attorney rather than by defendant's attorney? Was neither the acceptance nor rejection of the title by plaintiff's attorney to be of any consequence whatever? The language of the contract relating to the examination, acceptance, and rejection of the title, considered in connection with the subject matter, will reasonably and justly bear the construction we have given it; and, since no other rational meaning, purpose, or consequence of that language can be imagined, that construction should be accepted. It was but a reasonable and prudent precaution on the part of the plaintiff to insist upon the condition that the title should be passed and accepted by his own attorney, contrary to whose opinion and advice he was unwilling to invest thirty-five thousand dollars in a city lot. Had the condition been simply that the title should be good and marketable, the plaintiff might have been compelled to accept it and to pay for the lot, as the result of a tedious and expensive lawsuit, the judgment in which, as to the title, would not have been conclusive against any adverse claimant who was not a party to the suit.

Neither of the three cases cited by the counsel for respondent is in point. In *Winter v. Stock*, 29 Cal. 407, 89 Am. Dec. 57, the vendor warranted "an indisputable and satisfactory title, or no sale." In *Montgomery v. Pacific C. L. Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122, the title was warranted to be "perfect." The case of *Vought v. Williams*, 120 N. Y. 253, 17 Am. St. Rep. 634, was an action for specific performance of a contract of sale which provided that the title was to be "first class." In each of these cases the title was rejected by the attorney for the vendee; but in each the court held that the

material question was whether or not the title was good and marketable; and not whether it was acceptable to the vendee's attorney.

But in the case at bar, according to our construction of the contract, the only warranty or representation as to the quality of the title was that it should be acceptable ^{to} plaintiff's attorney. Therefore, the question whether or not the title was, in fact, a good marketable title, is not involved, as it was in the cases cited by counsel for respondent. And, since it appears that plaintiff's attorney rejected the title, and it is not even suggested that the rejection was not the result of a sufficient examination and an honest opinion, the order granting a new trial should be reversed, and it is so ordered.

Hearing in Bank denied.

VENDOR AND PURCHASER.—RIGHTS OF PURCHASER.—REJECTION OF TITLE BY PURCHASER'S ATTORNEY: See *Turner v. McDonald*, 76 Cal. 177; 9 Am. St. Rep. 489, and the note to *Montgomery v. Pacific Coast Land Bureau*, 28 Am. St. Rep. 128.

PEOPLE v. STOKES.

[108 CALIFORNIA, 193.]

COUNTY—DIVISION OF.—A CRIMINAL PROSECUTION may be commenced and prosecuted after the division of a county in the new county, if the crime was therein committed, though before such division. This remains true even though a prosecution was pending for the same crime in the courts of the late county before the division, if such prosecution was afterwards dismissed, and at the time of the trial and conviction the only proceeding pending was in the new county.

JURY TRIAL.—A JURY IS GUILTY OF MISCONDUCT for which a new trial must be granted in reading from a newspaper an article purporting to be a report of the evidence given at the trial, which report also contained evidence which the court had rejected as inadmissible, together with an intimation that two of the jurors had been corrupted.

JURY TRIAL.—IF IRREGULARITY ON THE PART OF A JURY IS SHOWN WHICH MAY HAVE INFLUENCED THE RESULT, a new trial must be granted, unless the successful party can satisfy the court that, as a matter of fact, such irregularity did not injuriously affect his adversary. This rule must be given a reasonable operation, and not applied where there is only a bare possibility of the result having been affected. The facts must be such that the court cannot determine with any reasonable certainty whether the result was affected or not.

JURY TRIAL.—MISCONDUCT OF THE JURY DURING A CRIMINAL TRIAL IN READING A NEWSPAPER containing a charge that two of their number will fail to bring in a verdict, and that it is believed that they are

known, and intimating that they have been bribed, entitles the defendant to a new trial if he is convicted, because if there were any upon the jury who were wavering as to their verdict, it is impossible for this court to say that the article did not have an effect in directing their final action.

WORDS, PROVINCIALISMS.—To speak of the probability that certain members of a jury will fail to agree upon a verdict, and to add in the same connection that those members are believed to be known, "and that the whereabouts of Colonel Mazuma are also known," is equivalent to charging that a corrupt application of moneys has been made to affect the action of the jurors to whom the allusion was made.

Horace L. Smith, for the appellant.

Attorney General W. H. H. Hart and M. L. Short, for the respondent.

¹⁹⁴ **GAROUTTE, J.** The defendant was charged with robbery, alleged to have been committed at Armona, on March 2, 1893. He was convicted of grand larceny, and appeals from the judgment and order denying his motion for a new trial. Upon March 2, 1893, the date of the alleged crime, Armona was in Tulare county. On May 29, 1893, the county of Kings was organized out of a portion of Tulare county, and Armona is now, and has been since that time, in the county of Kings. The defendant contends that the superior court of Kings county had no jurisdiction over the alleged offense, and for that reason the judgment of conviction is void. He raised the question in the court below upon motion to dismiss the prosecution for want of jurisdiction, and on the hearing of his motion supported it by evidence showing that before the organization of Kings county there was commenced in the superior court of Tulare county a prosecution for the identical offense charged in this case, which prosecution was pending in said court at the date of the organization of said Kings county. The prosecution in Tulare county was dismissed ¹⁹⁵ prior to the inception of criminal proceedings against the defendant, upon which he was subsequently convicted in Kings county.

Has the accused been tried and convicted in the proper county? We find no case directly in point upon the question here involved. The authorities all agree that the newly created county has jurisdiction of a defendant charged with an offense committed prior to the creation of the new county, and upon territory within its boundary lines. But the question of jurisdiction seems never to have arisen where a prosecution was actually pending at the time the new county was

created. As supporting the general principle above stated, see *McElroy v. State*, 13 Ark. 708; *Murrah v. State*, 51 Miss. 675; *State v. Bunker*, 38 Kan. 737; *State v. Jones*, 9 N. J. L. 357; 17 Am. Dec. 483; *State v. Donaldson*, 3 Heisk. 48; Bishop on Criminal Procedure, sec. 49.

We do not think that the fact of an existing prosecution against the defendant in Tulare county, at the date of the creation of the new county of Kings, causes any exception to the general rule declared in the foregoing authorities. At the time the accused was tried and convicted no proceedings were pending against him in Tulare county, and we are unable to see that he occupied any different position than if there had never been any prosecution begun in that county. Possibly a judgment of conviction under the first prosecution would have been a valid and legal judgment: *United States v. Dawson*, 15 How. 467. But even conceding such to be the fact, it does not follow that the mere circumstance of the existence of a pending prosecution at the date of the creation of the new county (which was subsequently dismissed), is a bar to a second prosecution. Why should it be? In the absence of the first prosecution it is conceded that the new county was the proper county for trial; yet, under the first prosecution, it is not claimed that the defendant was either acquitted or convicted, for it is perfectly apparent that jeopardy did not attach. He now stands before the court exactly as if no proceedings ¹⁹⁶ were ever taken against him in Tulare county. If the superior court of that county had no jurisdiction to try the defendant, then beyond question the prosecution and conviction were properly had in Kings county; and, if the superior court of Tulare county had jurisdiction of the offense and the defendant, it had jurisdiction for all purposes, and consequently it had the power to dismiss the prosecution and discharge the defendant. The fact that the court may have made the order upon insufficient grounds, and thus have committed error in so doing (which is not conceded), is foreign to the question. The dismissal of the case was a matter within the power of the court, and the order of dismissal, as far as the defendant is concerned, was as effectual as though made upon the most incontestible ground. We see no cause of complaint upon his part. He has been deprived of no constitutional right. He has had a speedy and public trial by an impartial jury, selected from the county including the territory upon which the crime was

committed. Indeed, the defendant is favored in this respect, for he has been tried by a jury selected from a vicinage much more restricted than if the trial had been had in the county where the original prosecution was begun.

2 It is insisted that a new trial should have been granted, because of misconduct of the jury after they had retired to deliberate upon their verdict. The misconduct charged consisted in the jury reading from a local newspaper an article containing a report of some of the evidence in the case, given at the trial, which included a matter of evidence the court had rejected as inadmissible, and also contained intimations that two of the jurors had been corrupted. The evidence bearing upon the question was given by the officer in charge of the jury. No contrary showing was made by the affidavits of jurors or otherwise. Indeed, conceding that the article was read by them, they could make no showing that would relieve them of the effects of their own misconduct. A juror is not allowed to say: "I ¹⁰⁷ acknowledge to grave misconduct. I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury-room." The law, in its wisdom, does not allow a juror to purge himself in that way. It was said in *Woodward v. Leavitt*, 107 Mass. 466, 9 Am. Rep. 49: "But where evidence has been introduced tending to show that without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show whether it did or did not influence their deliberations and decision. A juror may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind." There are intimations in the cases of *People v. Golden-son*, 76 Cal. 328, and *People v. Murray*, 85 Cal. 350, tending to oppose the foregoing views, but they do not express the law.

The article of which complaint is made had the following heading.

"The Stokes Case—Third Day of the Armona Robbery Trial—Undersheriff Hall Testifies About the Fifty-Dollar Silver Certificate—A Condensed Report of the Trial—A Hung Jury Intimated—Colonel Mazuma's Presence."

The article concludes as follows: "It is currently reported

on the streets that the jury will fail to bring in a verdict, and that two men will hang the jury. It is also believed that the two men are known, and that the whereabouts of 'Colonel Mazuma' are also known."

It is exceedingly unfortunate that a newspaper should publish such an article pending the trial of an important criminal case. Newspaper comments of this character are well calculated to interfere with the due and proper administration of justice. The jurors should not have read the article. The newspaper should not have published it. The publication of such articles during ¹⁹⁸ the pendency of important trials serves no good purpose, but, on the contrary, tends to impede and adulterate the stream of justice. This article results in giving a defendant a new trial in an important case, for we discern no other ground for a reversal of the cause save the one now under consideration.

We will now pass to an examination of the law. In speaking to this question Mr. Hayne, in his very valuable work upon New Trials and Appeals, after an exhaustive review of both principle and authority, at section 27, says: "The rule laid down by the foregoing cases, viz., that where an irregularity is shown which may have influenced the result, it is for the successful party to show that as a matter of fact it did not, rests upon sound principles. Corrupt and other improper actions are usually done in secret, and are carefully covered up, and it would always be difficult, and in many cases impossible, for the moving party to show that the irregularity was in fact followed by some corrupt or otherwise improper influence, while it is comparatively easy for the juror to explain an apparently doubtful act, if it be innocent. . . . The rule above stated is sustained by high authority. The views of such jurists as Shaw, Sharkey, Field, and Clifford are not to be lightly put aside. In California the cases of *People v. Backus*, 5 Cal. 276, and *People v. Brannigan*, 21 Cal. 337, and *People v. Turner*, 39 Cal. 370, seem to conclusively settle the matter. The rule, however, like every other rule, is to have a reasonable and not a forced application. It does not apply where there is only a bare possibility of the result having been affected. The case must be such that the court cannot determine with any reasonable certainty whether the result was affected or not." As directly supporting the author's text and the views of this court we cite: *Commonwealth v. Roby*, 12 Pick. 519; *Hare v. State*, 4 How. (Miss.)

193; *McCann v. State*, 9 Smedes & M. 468; *Keenan v. State*, 8 Wis. 138; *Commonwealth v. Wormley*, 8 Gratt. 714; 56 Am. Dec. 162; *State v. Prescott*, 7 N. H. 288; *People v. Backus*, 5 Cal. 199 276; *People v. Brannigan*, 21 Cal. 337; *People v. Turner*, 39 Cal. 370; *People v. McCoy*, 71 Cal. 395.

The remaining question presented is, Was the article one not calculated to prejudice the result of the trial? Is it apparent that it could have had no influence upon the verdict? If not, the defendant should be awarded a new trial, for he has not yet had that fair and impartial trial to which he is entitled by constitution and statute. It is said in *People v. McCoy*, 71 Cal. 395: "There is no doubt, however, that the reading of newspapers by jurors while engaged in the trial of a cause is an inattention to duty which ought to be promptly corrected, and, if the newspaper contains any matter in connection with the subject matter of the trial which would be at all likely to influence jurors in the performance of duty, the act will constitute ground for a motion for a new trial. . . . If it be proved as a fact, or may be presumed as a conclusion of law, that the verdict may have been influenced by information or impressions received from sources outside of the evidence in the case, such a verdict is subject to be set aside on a motion for a new trial": See, also, *Carter v. State*, 9 Lea, 440. Without considering that portion of the article containing a misrecital of the evidence we pass to the extract quoted above. That extract, in effect, states that two men will hang the jury, and that their identity is known to the public. If there were men upon the jury who were wavering as to the character of their verdict it is impossible for this court to say that this article, when read in the jury-room, did not have the effect of directing their final action. We cannot say from an inspection of the record that the reading of it by the jurors had no effect upon the character of the verdict rendered. We cannot say that the verdict of guilty is based wholly upon the evidence introduced at the trial.

The article goes to still greater lengths, and intimates that attempts are being made to corrupt the jury. It appears that the term "Colonel Mazuma" not only ²⁰⁰ does not indicate some gentleman with a military title, but it does not even refer to a person at all. We fail to find the term mentioned by our lexicographers, but understand it to be a modern provincialism, probably emanating from the daily press,

and used when referring to the corrupt application of money in the accomplishment of certain ends. If these jurors understood this term with the signification thus attached to it, it of itself furnished ample material to demand a retrial of the case. We see no other error in the record. As was said in *People v. Mitchell*, 100 Cal. 328: "It is unfortunate for the jury system, and for the cause of justice, that such episodes should occur in the trial of causes, but the evil will be soonest suppressed by wiping out verdicts rendered under such circumstances."

It is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

FITZGERALD, J., HARRISON, J., McFARLAND, J., and VAN FLEET, J., concurred.

COUNTIES—DIVISION—CRIMINAL PROSECUTIONS AFTER.—An offense committed in a county before its division is indictable in the new county embracing that portion of the old one in which such offense was committed: *State v. Jones*, 9 N. J. L. 357; 17 Am. Dec. 483. See the extended note to *Moss v. Shear*, 85 Am. Dec. 101.

NEW TRIAL—IRREGULARITY ON PART OF JURY.—It is a juror's duty not to allow himself to hear conversations concerning the case he is sitting in: *State v. Andrews*, 29 Conn. 100; 76 Am. Dec. 593, and note. See *Pritchett v. State*, 2 Sneed, 285; 62 Am. Dec. 468, and note, and *Bowman v. State*, 19 Neb. 523; 56 Am. Rep. 750.

EVIDENCE.—JUDICIAL NOTICE OF CURRENT WORDS AND PHRASES: See *Edwards v. San Jose Printing Soc.*, 99 Cal. 431, 37 Am. St. Rep. 70, and note, and the extended note to *Lanfear v. Mestier*, 89 Am. Dec. 691.

PEOPLE v. HARTMAN.

[108 CALIFORNIA, 242.]

JURY TRIAL, PUBLICITY, DENIAL OF.—An order of court at the commencement of the trial of a charge of rape, excluding from the courtroom during the trial all persons except the officers of the court and the defendant, is a direct violation of the provision of the constitution guaranteeing a public trial to a person accused of crime, and entitles him, if convicted, to a new trial.

JURY TRIAL.—A PARTY ACCUSED OF CRIME AND DENIED THE RIGHT TO A PUBLIC TRIAL is not required to show that he was injured by reason of the deprivation. He is, without making any such showing, entitled to have his conviction set aside.

RAPE.—THE FACT THAT THE PROSECUTRIX WAS OF UNCHASTE CHARACTER does not constitute any defense to a prosecution for a rape committed upon her.

C. W. Hartman, for the appellant.

H. V. Reardan, Attorney General *W. H. H. Hart*, and Deputy Attorney General *Charles H. Jackson*, for the respondent.

243 GAROUTTE, J. The appellant was convicted of an assault with the intent to commit rape, and now presents this appeal from the judgment of conviction.

When the information had been read to the jury and the defendant's plea stated, on motion of the district attorney and against the objection of the defendant, the court made an order excluding from the courtroom, during the trial of the case, all persons except the officers of the court and the defendant. This was a novel procedure, and has no justification in the law of modern times. We know of no case decided in this country supporting the course of procedure here pursued. It is **244** in direct violation of that provision of the constitution which says that a party accused of crime has a right to a public trial. The fact that the officers of the court were allowed to be present in no way made the trial public. For the purposes contemplated by the provision of the constitution, the presence of the officers of the court, men whom, it is safe to say, were under the influence of the court, made the trial no more public than if they too had been excluded.

While a right to the public trial contemplated by the constitution does not require of courts unreasonable and impossible things, as that all persons have an absolute right to be present and witness the court's proceeding, regardless of the conveniences of the court and the due and orderly conduct of the trial, yet this provision must have a fair and reasonable construction in the interest of the person accused. Judge Cooley, in his work upon Constitutional Limitations, page 383, has well declared the true rule in the following language: "The requirement of a public trial is for the benefit of the accused; that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would

only be drawn hither by a prurient curiosity, are excluded altogether."

In the case of *People v. Murray*, 89 Mich. 276, 28 Am. St. Rep. 294, the question now before the court is elaborately discussed; and, upon a state of facts more favorable to the accused than is presented by the present record, it was held that the defendant had not had a public trial. There is nothing to be found in *Grimmett v. State*, 22 Tex. App. 86; 58 Am. Rep. 630; *State v. Brooks*, 92 Mo. 573; or *People v. Kerrigan*, 73 Cal. 222, ²⁴⁵ that justified the action of the court in making the order of exclusion here assailed. The facts of those cases are widely at variance with the facts before us, and the law there declared entirely fails to serve as a legal support to the judgment here rendered. It is intimated in both the *Kerrigan* and *Grimmett* cases that, conceding the accused to be deprived of the right to a public trial, still the burden was upon him to show injury by reason of the deprivation. These intimations cannot be indorsed; a defendant charged with crime is entitled to certain rights under the constitution, and when he has been deprived of any one of them he has not had that fair and impartial trial to which he is entitled, however bad and degraded. This principle of law is in entire consonance with the views of the Michigan court as declared in *People v. Murray*, 89 Mich. 276; 28 Am. St. Rep. 294.

In the case of *People v. Swafford*, 65 Cal. 223, the court excluded all persons except the witnesses and persons connected with the case, and this action was sustained. It is there said that it does not appear that the accused objected to the order of exclusion, and *non constat*, but that such order was made at his express request. Whatever may be the legal soundness of the court's conclusion drawn from such a condition of the record, we think the compass of the order of exclusion too wide, and its limitations as to those allowed to be present at the trial entirely too restrictive. The trial should be public in the ordinary common-sense acceptation of the term. The doors of the courtroom are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial.

Section 125 of the Code of Civil Procedure, upon which the attorney general relies to support the action ²⁴⁶ of the trial court, has no reference whatever to the question here involved. The application of the rule there stated is confined exclusively to civil cases.

The fact that the prosecutrix may have been a woman of unchaste character is no defense to the charge stated in the information. A defendant is equally guilty under the law regardless of the good or bad morals of the woman assaulted.

It is ordered that the judgment be reversed and the cause remanded.

VAN FLEET, J., and DE HAVEN, J., concurred.

CRIMINAL LAW—PUBLIC TRIAL—RIGHT TO AND INFRINGEMENTS ON: See *People v. Murray*, 89 Mich. 276; 28 Am. St. Rep. 294, and extended note in which the subject is fully discussed, and the doctrine of the leading case approved.

RAPE—IMPEACHMENT OF CHARACTER OF PROSECUTRIX.—In prosecutions for rape the general character of the prosecutrix for chastity may be impeached, but specific acts of sexual intercourse by her with third persons cannot be shown: *People v. McLarn*, 71 Mich. 309; 15 Am. St. Rep. 263, and note; *McQuirk v. State*, 84 Ala. 435; 5 Am. St. Rep. 381; *McDermott v. State*, 13 Ohio St. 332; 82 Am. Dec. 444, and note; *State v. Forshner*, 43 N. H. 89; 80 Am. Dec. 132, and note; *State v. De Wolf*, 8 Conn. 93; 20 Am. Dec. 90, and note. On a trial for rape, evidence of specific unchaste conduct of the prosecutrix is inadmissible: *Shartzer v. State*, 63 Md. 149; 52 Am. Rep. 501, and note, but evidence is admissible to show that the prosecutrix was in the habit of receiving men at her dwelling for promiscuous intercourse: *Woods v. People*, 65 N. Y. 515; 14 Am. Rep. 309, and note. See, also, the extended note to *Smith v. State*, 80 Am. Dec. 368.

WILSON v. STUMP.

[108 CALIFORNIA, 265.]

REWARDS.—IF A PERSON PROCLAIMS THAT HE IS DESIROUS OF OBTAINING AN ALLEGED LETTER, and will pay a reward for its production to him, one who, in consideration of such proclamation and offer, produces the letter and claims the reward is entitled to a judgment therefor.

REWARD.—PLEADING, WHETHER NECESSARY TO NEGATIVE REVOCATION OF. If a complaint alleges an offer of a reward, and that within five days thereafter in reliance thereon plaintiff performed the service requested, it need not aver that such offer had not been revoked or withdrawn. If the offer was not limited in time, it will be presumed to have remained open during the fifth day after it was made.

James A. Waymire, for the appellant.

Stanly, Stoney & Hayes, Stanly & Hayes, and Arthur Rodgers, for the respondent.

256 VANCLIEF, C. The complaint in this action shows that in October, 1890, the defendant was desirous of obtaining a certain letter said to have been written by Henry H Markham, the alleged contents of which were in dispute.

That on or about the twenty-fourth day of October, 1890 the defendant proclaimed and asserted that he was desirous of obtaining a genuine letter written by said Markham of the alleged character and contents, and that he would pay a reward of one thousand dollars for the production to him of such genuine letter containing the disputed matter.

"That, in consideration of said offer, promise, and agreement on the part of the defendant, this plaintiff did, on the twenty-ninth day of October, 1890, produce to, and left in the personal custody of, the defendant, for the period of twenty-four hours, the said genuine letter, so as aforesaid written by said H. H. Markham, and did then and there demand from the defendant the payment to him of said offered reward or compensation of one thousand dollars; but, notwithstanding such production and delivery of such genuine letter, defendant did then refuse, and ever since has and still does refuse, to pay to plaintiff said sum of one thousand dollars, or any part thereof."

The defendant demurred "on the ground that said complaint does not state facts sufficient to constitute a cause of action in this, to wit, that it does not show a sufficient consideration, or any consideration, for the agreement therein alleged."

257 The court overruled the demurrer, and rendered judgment in favor of plaintiff for the sum demanded by default of defendant in failing to answer.

The defendant brings this appeal from the judgment upon the judgment-roll, and contends that the court erred in overruling the demurrer.

It is true that the alleged offer and promise to pay the reward was only a proposal or conditional promise on the part of the defendant, and not a consummated contract; but if, in reliance upon that offer, the plaintiff accepted the proposal and performed the service for which the reward was offered before the offer was revoked, a valid contract was

thereby consummated: *Ryer v. Stockwell*, 14 Cal. 134; 73 Am. Dec. 634. Nor is this controverted by appellant's counsel; but he contends that the complaint does not show that plaintiff knew the reward had been offered, or that plaintiff performed the service in reliance upon the promise of defendant. I think, however, the language of the complaint clearly implies all this, and is quite sufficient to stand the test of general demurrer. These alleged deficiencies are not specified in the demurrer, the only specification (if it may be called such) being that the complaint does not show any consideration for the alleged contract, while the points made here are much more specific, and not necessarily suggested by the demurrer. But the allegation of the complaint is, "that in consideration of said offer, promise, and agreement on the part of the defendant," the plaintiff produced the letter, etc., and "then demanded" the reward; and this means that the offer of the defendant was the cause which moved plaintiff to perform (*Webster's Dictionary*, Consideration), and implies that he knew, before he performed, that the offer had been made.

It is further objected that the complaint does not show that the offer had not been revoked before the performance.

The complaint shows that the offer was made October 24th, and that within five days thereafter, in reliance ²⁵⁸ upon it, the plaintiff performed the service requested. *Prima facie*, this shows a complete contract and performance on the part of the plaintiff. The offer was not limited in time, and the presumption is, that it was open on the fifth day after it was made, nothing to the contrary appearing. The revocation of it, if it had been revoked, was matter of defense.

Hewitt v. Anderson, 56 Cal. 476, 38 Am. Rep. 65, cited by appellant, is not in point. In that case the court, upon a trial, found as a fact "that none of the acts of the plaintiff were done with a view to obtaining said reward, or any part thereof, but all of said acts were done without any intention of claiming said reward, or any part thereof."

I think the judgment should be affirmed.

BELCHER, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

McFARLAND, J., GAROUTTE, J., DE HAVEN, J.

REWARDS—OFFER WHEN BECOMES BINDING CONTRACT.—An offer of reward for the recovery of property, or the detection of one who has committed a crime is a proposal merely; if acted upon before revocation, the offer and acceptance becomes a valid contract for a sufficient consideration: *Mitchell v. Abbott*, 86 Me. 338; 41 Am. St. Rep. 559, and note; *Kasling v. Morris*, 71 Tex. 584; 10 Am. St. Rep. 797, and note; *Central R. R. etc. Co. v. Cheatham*, 85 Ala. 292; 7 Am. St. Rep. 48, and note.

MCDOWELL v. HIS CREDITORS.

[103 CALIFORNIA, 264.]

HOMESTEAD.—A BUILDING CONSTRUCTED FOR USE AS A HOTEL, and primarily used for that purpose, cannot be selected and held exempt as a homestead, though the debtor and his family occupied it as their home, if his and their residence therein has been for the purpose of maintaining and conducting the business of a hotel, and for no other purpose.

Warren & Taylor and T. M. Osmont, for the appellant.

L. F. Coburn, for the respondent.

265 The COURT. Upon further consideration of this cause in Bank we are satisfied with the conclusion reached by Department One in its opinion filed March 2, 1894, and, for the reasons stated in said opinion, the judgment and order appealed from are affirmed.

The following is the opinion of Department One above referred to:

BELCHER, C. This is an appeal by J. E. McDowell, an insolvent debtor, from an order refusing to set apart to him certain real property as a homestead.

266 The appellant was adjudged to be an insolvent debtor on the twenty-first day of January, 1893, by the superior court of Siskiyou county. At that time he was the owner of the property in question which consisted of certain land and the building thereon in the town of Sissons. Ten days later he filed a petition asking to have the property set apart to him as a homestead. The application was opposed by some of his creditors, and, after a hearing, was denied by the court.

The findings of the court were, in substance, as follows: During the year 1886 appellant was engaged in conducting a hotel and boarding-house at McCloud, and, in the spring of 1887, at the request of friends, he erected the said building at Sissons, for the special purpose of boarding and lodging

railroad men and the public generally. As first constructed, the building consisted of a bar-room, office, dining-room, and eight sleeping-rooms, but during the year it was enlarged somewhat. A large sign was placed upon it designating it as the "El Monte Hotel," and by that name it was advertised in the newspapers and by cards. From the time of its completion in the spring of 1887 until June 12, 1890, appellant used the said building primarily as a hotel. For the purpose of conducting the same as a hotel he employed chambermaids, cooks, and waiters, and his wife superintended the chamber-work and dining-room, and he had general supervision, and conducted a bar in the house. His wife died in August, 1889, at the city of Los Angeles, leaving a female child, who was subsequently taken to Sissons and kept in the "El Monte" for about two months and then returned to Los Angeles. On November 20, 1889, appellant made and filed for record a declaration of homestead upon the said premises, and the same was duly recorded in the office of the county recorder. On June 12, 1890, appellant leased the whole of the said premises as a hotel for the term of one year, and did not in the lease reserve any portion thereof for his own use.

The court further found: "That said hotel, ever since its²⁶⁷ construction in 1887, has been used primarily as a hotel, and not as a home of the said James E. McDowell."

"That the residence of said James E. McDowell therein has been for the purpose of managing and conducting the business of a hotel, and for no other purpose"; and, as conclusions of law, "that the said James E. McDowell, at the time he filed for record his aforesaid declaration of homestead, was not entitled, under the law, to file said declaration upon said real estate," and "that he is not now entitled to have the said property set apart to him as a homestead."

The only specifications found in the bill of exceptions, and the only grounds urged for a reversal of the order, are that the two last findings which we have quoted were not justified by the evidence, and that the conclusions of law were not supported by the facts found.

It is objected for respondents that the findings not assailed are sufficient to uphold the order appealed from; but waiving that point, the order cannot, in our opinion, be disturbed upon either of the grounds urged for its reversal.

The evidence clearly tended to show that the building was

constructed to be used, and that from the time of its construction it was used, primarily and principally, as a hotel for the accommodation of the public. And it was being so used by appellant at the time he filed his declaration of homestead.

This being so, the case is plainly within the rule declared in *Laughlin v. Wright*, 63 Cal. 113. In that case it was said: "The use of the property is an important element to be considered"; and it was held that when the property is primarily and chiefly used as a hotel for the accommodation of the public it would be doing violence to the statute to regard it as a homestead, although the owner may reside there with his family for the purpose of carrying on the business.

What was said in that case upon this subject was not *obiter dictum*, and the decision has never been overruled. In *Heathman v. Holmes*, 94 Cal. 296, the case is referred ²⁶⁸ to, and distinguished from the one then under consideration, but the correctness of the decision is not questioned when limited to the facts involved in it.

Upon the authority of *Laughlin v. Wright*, 63 Cal. 113, the order appealed from here should be affirmed.

TEMPLE, C., and HAYNES, C., concurred.

HOMESTEAD—PARTIAL USE OF PREMISES AS HOTEL.—When a two-story house is used in part as a homestead and in part as a hotel, and the rooms on the first floor used for hotel purposes are also used by the family as a passageway between rooms occupied as a home, and for ingress and egress to the building, and the second story of the building, though used exclusively for hotel purposes, is inaccessible except through that part occupied as a homestead, the whole building must be treated as a homestead, and therefore declared exempt from execution: *Cass County Bank v. Weber*, 83 Iowa, 63; 32 Am. St. Rep. 288, and note, with the cases collected. See, also, the note to *Arendt v. Mace*, 9 Am. St. Rep. 210, and the extended note to *Pryor v. Stone*, 70 Am. Dec. 349

KENDALL v. PARKER.

[108 CALIFORNIA, 819.]

NEGOTIABLE INSTRUMENTS, WHAT ARE NOT.—A promissory note providing that in case suit is brought thereon the makers will pay such additional sum as the court may adjudge reasonable as attorney's fees, is not negotiable.

AN INDORSEMENT IN BLANK OF A NON-NEGOTIABLE PROMISSORY note by the payee does not render him answerable under the statutes of California, as if the note were negotiable, to his immediate indorsee, nor to any subsequent indorsees of the latter.

A PROMISSORY NOTE is a written engagement to pay absolutely and unconditionally a certain sum of money. If the instrument provides that in case of a suit thereon that the plaintiff may recover such additional sum as the court may deem reasonable for attorney's fees it cannot be a promissory note.

L. T. Hatfield, for the appellant.

Johnson, Johnson & Johnson, for the respondent.

220 The COURT. This is an appeal from a judgment entered after appellant's demurrer had been overruled, appellant standing upon his demurrer.

The complaint is upon a promissory note which is non-negotiable, because it contains a stipulation for an **221** attorney's fee. Suit is brought by the assignee of the first assignee against the makers and the payee as indorser.

The complaint avers that Hill assigned the note by writing his name upon the back thereof, and by delivering the same to the Huntington-Hopkins Company before the maturity of the note.

The Huntington-Hopkins Company, upon the maturity of the note, presented the same to the makers, and demanded payment thereof. The said makers refused and failed to pay the same or any part thereof, of which demand and failure due notice was given to the defendant Hill. The note was transferred to plaintiff by the Huntington-Hopkins Company, without recourse and after maturity.

The complaint was demurred to on several grounds, all, however, founded upon the proposition that the complaint fails to show any liability on the part of Hill.

Plaintiff had judgment, not only for the debt which the note was given to secure, but for one hundred dollars, attorney's fee. The stipulation in regard to an attorney's fee in the note is: "And in case suit is instituted to collect this note, or any portion thereof, we, or either of us, promise to

pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit."

The question here presented is, whether, when the payee of a non-negotiable note transfers the same by a simple indorsement in blank, he becomes liable as the indorser of a negotiable note would, not only to his immediate indorsee, but to the indorsee of his indorsee, the second indorsement being also in blank; or, as in this case, "without recourse."

It was held in England, prior to the statute of 3 and 4 Anne, that by the custom of merchants, when the payee indorsed his name upon a negotiable note, intending thereby to transfer it, the indorsee was at liberty to ²²² write over the signature not only an assignment, but a conditional guaranty of payment.

The law thus made for the indorser of such a paper, a contract not expressed, and which, independently of the law, there was nothing in the nature of the transaction to indicate. Independently of statute law, there is no custom or rule of law which can add such a condition to the assignment of a non-negotiable note. In many states, however, there are statutory provisions on the subject.

In 1850 the legislature of this state passed an act in regard to bills of exchange and promissory notes (Stats. 1850, p. 247), the first and fourth sections of which are as follows:

"All notes in writing, made and signed by any person, whereby he shall promise to pay to any other person, or to his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants.

"The payees and indorsees of every such note, payable to them or their order, and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned, against the makers and indorsers of the same, respectively, in like manner as in cases of inland bills of exchange, and not otherwise."

In *Hamilton v. McDonald*, 18 Cal. 128, this court had occasion to consider the liability of an indorser of a non-negotiable promissory note, as affected by that act.

There, as here, the action was against the first indorser by the indorsee of the first indorsee. It was contended that the

action could not be maintained for want of privity. The court said:

"The answer to this objection is to be found in the provisions of the statute regulating the rights and liabilities of the parties. The fourth section of the act of ²²³ April, 1850, relative to bonds, due bills, etc., makes every assignor of a non-negotiable note liable upon his assignment to the assignee of such note, and it is evident from the language used that it was not the intention to limit this liability to his immediate assignee. The rule at common law was that, as between the assignor and his immediate assignee, the assignment created the same liabilities and obligations on the part of the assignor as the indorsement of a negotiable note created on the part of the indorser. But, in respect to subsequent holders, no privity or connection existed between them and the assignor, unless expressly created by the assignment, and where this was not done the immediate assignee was the only person who could maintain an action in his own name against the assignor. The statute places the subsequent holder upon the same footing with the original assignee, and gives him a right of action against every person from whom the instrument has passed by assignment."

It is claimed that this statute was repealed by the code, and a very different rule established. At common law, however, although the subsequent holder could only sue his immediate indorser in his own name, he could sue the more remote indorser at law in the name of his assignor, or could obtain relief against them in equity in his own name: Story on Promissory Notes, sec. 128.

Whether the statute of 1850 is repealed or not under our practice, it cannot be doubted that such holder may still sue in his own name, if the liability of such indorser is admitted.

It may be remarked here that neither under the statute of 1850, nor at common law, would the instrument sued upon be considered a promissory note at all. Under the act of 1850 the note was required to be for the payment of a sum of money therein mentioned.

According to Blackstone, a promissory note was an engagement in writing to pay a sum specified: 2 Blackstone's Commentaries, 467.

²²⁴ Story says it is a written engagement to pay absolutely and unconditionally a certain sum of money: Story on

Promissory Notes, sec. 1; and the author expressly shows that the definition applies both to negotiable and non-negotiable notes: Sec. 3. See, also, Byles on Bills, 5-41; Chitty on Bills, 548; 8 Kent's Commentaries, 74.

The instrument is not a promissory note when there may be contingent additions: *Smith v. Nightingale*, 2 Stark. 330; Civ. Code, 3244.

The note involved in *Hamilton v. McDonald*, 18 Cal. 128, had all the elements of a negotiable note, except that it was not payable to bearer or to order. But has the code made no change in this matter? Section 3087 of the Civil Code defines a negotiable instrument as "a written promise or request for the payment of a certain sum of money to order or bearer in conformity to the provisions of this code," and all the provisions of the code in relation to the liability of drawers and indorsers, and in reference to demand, notice, and protest, are expressly limited to such instruments.

Moreover, section 1774 of the Civil Code defines what liabilities one incurs who sells or agrees to sell other choses in action. Originally, this section contained a further provision, which was stricken out in 1874, that such seller thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all the parties thereto.

Some of the liabilities created by this section are identical with those created by section 3116 of the Civil Code as to the parties to the assignment of negotiable paper, and others are evidently in lieu of them. In view of these sections, can it be said that the rule established by the act of 1850 is still in force? *First Nat. Bank v. Falkenhan*, 94 Cal. 141, is cited as authority for the judgment entered in this case. That action was brought by the first indorsee against his immediate indorser, and the note was indorsed with an express waiver of protest. This was held to be an indication ²²⁵ that the indorser expected to be held as a guarantor. The writer quotes a rule laid down in 1 American Leading Cases, to the effect that a mere indorsement is but a transfer of the note, and whether any and what liability is incurred by the transfer by indorsement and delivery of such a note will depend upon the intention of the parties and the circumstances of the transaction.

It is expressly stated that this rule is sufficient for the case in hand. What follows in regard to an alleged further

rule upon the subject must be regarded as *obiter*. The case does not support the position of respondent.

The judgment against Hill is reversed, and the court directed to sustain the demurrer to the complaint.

NEGOTIABLE INSTRUMENTS—ATTORNEY'S FEES—EFFECT OF STIPULATION FOR PAYMENT OF.—A stipulation in a bill of exchange to pay all attorney's fees in case of suit thereon does not destroy its negotiability: *Bank v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461, and note; *First Nat. Bank v. Slaughter*, 98 Ala. 602; 39 Am. St. Rep. 88, and note. See, also, the notes to *Tinsley v. Hoskins*, 32 Am. St. Rep. 802, and *Dorsey v. Wolf*, 34 Am. St. Rep. 106, and the extended note to *Witherspoon v. Musselman*, 29 Am. Rep. 406.

PROMISSORY NOTES DEFINED.—A promissory note is a written promise by one person to pay another person named therein or order a certain sum of money at all events, and at a time specified therein, or at a time which must certainly arrive: *Dorsey v. Wolf*, 142 Ill. 589; 34 Am. St. Rep. 99, and note. See, also, the note to *Jennings v. First Nat. Bank*, 16 Am. St. Rep. 214, and the extended note to *Currier v. Lockwood*, 16 Am. Rep. 43-46.

NON-NEGOTIABLE INSTRUMENTS—LIABILITY OF INDORSERS IN BLANK. In respect to the immediate indorsee of the payee of a non-negotiable promissory note the indorsement creates the same liabilities and obligations as the indorsement of a negotiable note: *First Nat. Bank v. Falkenhan*, 94 Cal. 141. A blank indorsement of a non-negotiable note implies a warranty that the maker is able to pay it, and that it is collectible by due diligence: *Prentiss v. Danielson*, 5 Conn. 175; 13 Am. Dec. 52, and extended note. A blank indorsement of non-negotiable paper is mere authority to the holder to fill it up, but until this is done the legal title is in the payee: *Taylor v. Larkin*, 12 Mo. 103; 49 Am. Dec. 119. Where a person not a party to a non-negotiable note indorses it in blank at the time it is made and delivered to the payee, for the purpose of giving original validity and security to the contract, such person is liable upon the note as a joint maker: *Houghton v. Ely*, 26 Wis. 181; 7 Am. Rep. 52, and note.

CHILDS v. LANTERMAN.

[106 CALIFORNIA, 837.]

A JUDGMENT AGAINST AN INFANT WITHOUT THE APPOINTMENT OF A GUARDIAN AD LITEM is not for that reason void.

A JUDGMENT AGAINST AN INFANT WITHOUT THE SERVICE OF PROCESS UPON HIM in an action in which he appeared by attorney will be upheld as fully as if he had appeared in person.

IF AN INFANT IS ENTITLED TO VACATE A JUDGMENT AGAINST HIMSELF, because based upon his appearance entered by an attorney in an action in which process was not served, he must move promptly for such vacation on coming of age, and if, instead of so doing, he moves for a new trial, and, upon its being denied, appeals and takes no action to question the judgment on the ground that the appearance of the attorney was unauthorized, until after the judgment is affirmed on appeal, he

thereby ratifies the action of the attorney in appearing for him, and precludes himself from further questioning the judgment.

JURISDICTION, SUBMISSION TO, WHAT IS.—If a defendant, though not served with process, takes such a step in the action, or seeks such relief at the hands of the court, as is consistent only with the hypothesis that it had jurisdiction, he thereby submits himself to the jurisdiction of the court, and is bound by its action as if he had been regularly served with process.

M. W. Conkling and Edwin A. Meserve, for the appellant.

Will D. Gould, for the respondent.

389 HARRISON, J. The plaintiff brought this action to quiet her title to certain lands in the county of Los Angeles, making Roy S. Lanterman, the appellant herein, one of the defendants. An answer to the complaint was filed by Stephen M. White, as attorney for all the defendants, including the appellant, and upon a trial of the cause judgment was rendered in favor of the plaintiff. When the action was commenced, and at the 390 time of the trial, the appellant was an infant, and did not attain his majority until July 20, 1890. No order of court was made appointing a guardian *ad litem* for him, and the record does not contain any evidence that the summons in the action was served upon him, although it is not alleged or shown that service was not in fact made upon him. The findings of the court were filed July 12, 1890, but the judgment, although signed as of that date, was not filed or entered until July 21st. Thereafter, a motion for a new trial was made in behalf of the defendants—Roy S. Lanterman, the appellant herein, making and filing an affidavit in support thereof—and this motion being denied, the defendants appealed from the order and also from the judgment. Upon this appeal the order and judgment were affirmed: *Childs v. Lanterman*, 95 Cal. 369. After the *remititur* had been filed in the court below, viz., March 9, 1893, a motion was made on behalf of Roy S. Lanterman to set aside the findings and judgment against him, and to strike out the answer filed on his behalf, upon the ground of his infancy at the time the answer was filed and trial had, and the want of any authority in the attorney to appear in his behalf. This motion was denied, and the present appeal is from that order.

Although it is provided in section 372 of the Code of Civil Procedure that when an infant is a party he must appear either by his general guardian, or by a guardian *ad litem* appointed by the court, yet a judgment rendered against an

infant, in which no guardian *ad litem* has been appointed, is not for that reason void: 1 Black on Judgments, sec. 195; *Emeric v. Alvarado*, 64 Cal. 600; *Kemp v. Cook*, 18 Md. 130; 79 Am. Dec. 681; and a judgment rendered against him in an action in which he has appeared by an attorney will be upheld as fully as though he had appeared in person: *Barber v. Graves*, 18 Vt. 290; *Marshall v. Fisher*, 1 Jones, 111; *Townsend v. Cox*, 45 Mo. 401. The appearance by an attorney in his behalf will be assumed as authorized by ²⁹¹ him, so far as the direction and consent of the infant can give authority: *Kemp v. Cook*, 18 Md. 130; 79 Am. Dec. 681; and if, after reaching majority, he would repudiate such appearance, it is incumbent upon him, when he takes any action with reference to the judgment, to indicate his repudiation, rather than do some act which assumes that the authority was given. If he then treats the judgment as having been regularly entered, and makes no objection upon the ground of irregularity or want of jurisdiction, he waives his right thereafter to make such objection. As the judgment is not void, but is merely voidable at his instance, it may be affirmed by him, and, as in the case of any other obligation that he has assumed during infancy which is susceptible of ratification, it will be considered as affirmed by him if he takes any action in reference thereto, after he comes of age, which is consistent only with assuming its validity.

At the time the judgment herein was entered, the appellant had reached his majority. He could then have sought relief therefrom upon the ground of irregularity in the service of process upon him, or want of authority in the attorney to appear for him, by reason of his infancy; instead of which, however, he moved the court for a new trial, and failing therein, appealed to this court, not only from this order but also from the judgment, and it was not until after the affirmance of that judgment, nearly three years subsequent to its entry, that his infancy at the time it was rendered was brought to the attention of the court. Nor did he, upon the hearing of the present motion, make any personal showing or affidavit in his own behalf, the motion having been presented through an attorney without any affidavit by himself in support thereof, indicative of his desire to avoid the judgment. It is also to be observed that the appellant does not deny that the appearance of the attorney in his behalf was with his full knowledge and concurrence. We are of the opinion that by these acts the appellant

submitted himself to the jurisdiction of ²⁹⁹ the court, and is bound by its judgment. It is well settled that if a defendant, though not served with process, takes such a step in an action, or seeks such relief at the hands of the court as is consistent only with the hypothesis that the court has jurisdiction of the cause and of his person, he thereby submits himself to the jurisdiction of the court, and is bound by its action as fully as if he had been regularly served with process: *Coad v. Coad*, 41 Wis. 26; *Wood v. Young*, 38 Iowa, 102; *Crowell v. Galloway*, 3 Neb. 215; *Foots v. Richmond*, 42 Cal. 443. "A party cannot come into court, challenge its proceedings on account of irregularities, and, after being overruled, be heard to say that he never was a party in court or bound by those proceedings. If he was not in fact a party, and had not been properly served, he can have the proceedings set aside on the ground of want of jurisdiction, but he must challenge the proceedings on that single ground. This is familiar doctrine": *Burdette v. Corgan*, 26 Kan. 104.

The motion of the appellant herein for a new trial, and his appeal from the judgment upon the ground that the court erred in rendering such judgment, assumed that the court had jurisdiction of him, and was a waiver of his right to question that fact: *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563; *Mason v. Alexander*, 44 Ohio St. 329.

The order is affirmed.

GAROUTTE, J., and VAN FLEET, J., concurred.

INFANTS—SUITS AGAINST.—NECESSITY FOR GUARDIAN AD LITEM: See the notes to *Alton v. Emmerson*, 29 Am. St. Rep. 644, and *Parker v. Parker*, 99 Ala. 239; 42 Am. St. Rep. 48, where the cases are collected.

JURISDICTION—WAIVER BY APPEARANCE.—When a nonresident appears and interpleads in response to the process of a court having no jurisdiction to issue it, such appearance must be regarded as a waiver of the right to object to the jurisdiction of the court: *German Bank v. American etc. Ins. Co.*, 83 Iowa, 491; 32 Am. St. Rep. 316, and note; *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135, and note; *Union Pac. Ry. Co. v. De Busk*, 12 Col. 294; 13 Am. St. Rep. 221, and note; *Pierce v. Equitable etc. Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433. The courts of New York have jurisdiction of an action commenced therein to recover damages sustained from a trespass upon real property situated in another state, when the defendant does not object to the exercise of jurisdiction, and the plaintiff has waived his objection by commencing suit: *Sentenis v. Ladew*, 140 N. Y. 463; 37 Am. St. Rep. 569. See the notes to *Renier v. Huribut*, 29 Am. St. Rep. 855; *Frane v. Ambuster*, 26 Am. St. Rep. 347, and *Alley v. Caspari*, 6 Am. St. Rep. 180.

INFANTS—ACTIONS AGAINST—APPEARANCE BY ATTORNEY.—A minor can only appear to defend by guardian, and not in person or by attorney: *Peak v. Shasted*, 21 Ill. 137; 74 Am. Dec. 83, and note; *Thornton v. Thornton*, 27 Mo. 302; 72 Am. Dec. 266, and note; *Powell v. Gott*, 13 Mo. 458; 53 Am. Dec. 153, and note; *Johnson v. Waterhouse*, 152 Mass. 585; 23 Am. St. Rep. 658, and note. A judgment taken against an infant served with process and represented by attorney, though without the appointment of a guardian *ad litem*, is valid and not subject to collateral attack: *Cokee v. Baer*, 134 Ind. 375; 39 Am. St. Rep. 270.

INFANTS—VOIDABLE JUDGMENT AGAINST—DUTY TO AVOID.—An infant with knowledge of an irregular and voidable judgment against him must move to avoid it within a reasonable time after attaining his majority; an unexcused delay of more than a year will bar his right: *Eisenmenger v. Murphy*, 42 Minn. 84; 18 Am. St. Rep. 493.

SHEARER v. PARK NURSERY COMPANY.

[108 CALIFORNIA, 415.]

DAMAGES FOR WARRANTY OF QUALITY AT WHAT TIME TO BE ESTIMATED

For a breach of the warranty of the quality of personal property sold, a purchaser is not always limited to the time of such breach, but may recover damages sustained up to the time when the breach is discovered, or with ordinary care and attention might have been discovered, if such damages were not with such care and attention discoverable at the time the breach was made.

NURSERYMAN, DAMAGES RECOVERABLE AGAINST FOR BREACH OF WARRANTY

as to kind of trees sold. If a nurseryman is applied to for trees of a certain class which he knows are to be used to be set out as part of an orchard, and he delivers trees of a different class which are set out and grown, until from the fruit borne by them it is certain they are not of the kind ordered, he is answerable for damages; and such damages may be ascertained by proving the value of the land occupied by the trees at the time when the breach of the warranty was discovered through their bearing fruit, and deducting the sum so ascertained from the value the same land would have had at the same time if the trees ordered by the plaintiff had been planted and cultivated instead of the kind sold to and cultivated by the plaintiff.

W. E. Arthur and A. D. Yocum, for the appellant.

Spencer G. Millard, for the respondent.

417 **VANCLIEF, C.** The defendant being a corporation engaged in the business of raising and selling nursery fruit-trees, the plaintiff, on March 7, 1891, ordered from it five hundred nursery peach-trees of specified varieties, namely, two hundred Susquehanna, two hundred Muir, and one hundred Solway, and thereupon defendant sold and delivered to plaintiff five hundred young trees at the price of twenty cents

apiece, representing them to be of the varieties and in the proportions ordered, and so labeled them. The plaintiff did not know, and had no means of ascertaining, whether or not the trees were such as ordered, until after he had planted them and had cultivated them about two years, when they first bore fruit, and therefore relied solely upon the representations of the defendant as to the varieties of the trees. When the trees first bore fruit it appeared that two hundred and sixty-eight of them were of a different and inferior variety from either of those ordered, and were of a kind that plaintiff did not desire, and which, when planted, occupied about two and one-half acres of plaintiff's land.

The object of this action was to recover damages alleged to have been suffered by plaintiff in consequence of a breach of the warranty that the trees were of the kinds ordered.

The judgment was in favor of plaintiff for three hundred and fifty dollars, from which, and from an order denying his motion for a new trial, the defendant appeals.

The principal point contended for by appellant is that the court did not measure the damages by the proper rule, which they say is that expressed by section 3313 of the Civil Code, as follows:

"The detriment caused by the breach of the warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time."

⁴¹⁸ To what time, in the sense of this section, does a warranty of the quality of personal property refer? Does it refer to the time of completion of the sale by delivery of the property, or to the time of the breach of the warranty, or to the time when the breach is discovered, or with ordinary care and attention might be discovered, by the purchaser? When the quality of the property is apparent, or with ordinary care may be ascertained at the time of delivery, all three of those conditions coexist at that time, as they did in the case of *Hughes v. Bray*, 60 Cal. 284, in which it was held that a warranty of barley referred to the time of delivery, and that the measure of damages was the difference between the market value of the (inferior) barley delivered and an equal quantity of the quality warranted at the time of delivery; and this, the court said, was in accordance with section 3313 of the Civil Code. And doubtless this was correct on the

facts of that case, since the delivery, the breach of warranty, and presumable notice of such breach, concurred in point of time; and it would have been equally correct to have said in that case that the measure of damages was the difference in values, etc., at the time of the breach of the warranty, or at the time the breach was discovered. But the court did not say, and surely did not intend to be understood as meaning, that all warranties of the class specified in section 3313 of the Civil Code refer to the time of delivery of the property, since such a construction would not only be contrary to the common law as administered in the United States and England, but would effect rank injustice in a large class of cases, of which the case at bar is an example: Sutherland on Damages, secs. 673-676; Sedgwick on Damages, secs. 191, 763, and cases cited. Under such construction the measure of plaintiff's damages in this action would be merely the difference between the value of the trees delivered and the same number of trees of the kinds ordered at the time of delivery, and before they were replanted by plaintiff. And so it would be in all cases of warranty of seeds.

⁴¹⁹ As to whether a warranty of this class refers to the time of the breach thereof, it is enough to say that if cases ever occur in which the purchaser suffers damage after the breach and before the time when he discovers, or with ordinary care and attention might discover, the defect in the property warranted, the warranty does not in such cases refer to the time of the breach, but to the time when the defect was or might have been discovered. The time of the breach depends upon the nature and meaning of the warranty. What was warranted? In this case I am inclined to the opinion that the defendant warranted that the trees would bear the kinds of fruit known by the names Susquehanna, Muir, and Solway peaches. If so, the breach occurred when they first bore a different kind of fruit, so that here again the breach and the discovery thereof were concurrent events. But if such is not the meaning of this warranty the breach must have occurred at the time the trees were delivered.

But since it seems probable that cases of the class specified in section 3313 of the Civil Code may occur in which the breach and the discovery thereof are widely separate in point of time, the only reasonable construction of that section which may have a uniformly just effect is, that the time to which

the warranty refers is the time when the breach thereof is, or with due diligence might be, discovered by the purchaser.

The action of the trial court in admitting evidence against the objections of defendant was consistent with this construction. The sole effect of such evidence was to prove the difference between the value of trees of the kinds ordered by plaintiff, and the trees actually delivered by defendant at the time when those delivered first bore fruit, that being the earliest date at which plaintiff discovered, or could have discovered, the breach of the warranty. It was, however, to the mode of proving this difference of values that defendant more specially objected, which was: 1. To prove the value of the land occupied by the trees at the time the breach of warranty ⁴²⁰ was discovered; and 2. The value the land would have had at the same time if trees of the kinds and proportions ordered by plaintiff had been planted and cultivated, instead of the two hundred and sixty-eight trees of a kind not ordered by plaintiff.

It is strenuously contended that the allowance of any evidence of the value of the land was material error, for which the judgment should be reversed. But since growing fruit-trees are a part of the land, and probably of no value when severed from it (*Montgomery v. Locke*, 72 Cal. 75), it was proper to prove how much the different kinds of trees added to the value of the land; and the difference between the value thus added by the trees delivered and the value that would have been added if the trees ordered had been planted instead of those seems to be the measure of plaintiff's damage, according to section 3313 of the Civil Code. "It is settled in New York," says Mr. Sutherland (*Sutherland on Damages*, sec. 1019), "that where fruit-trees are destroyed or injured, and their owner asserts his right to go beyond their value after severance from the land, so as to obtain compensation for the damage done the latter, his recovery is measured by the difference between the value of the land before and after the injury": Citing *Dwight v. Elmira etc. R. R. Co.*, 132 N. Y. 199; 28 Am. St. Rep. 563.

On the assumption that the mode of proof was not materially erroneous, the findings of fact are justified by the evidence.

I think the judgment and order should be affirmed.

SEARLS, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

McFARLAND, J., FITZGERALD, J., HARRISON, J.

Hearing in Bank denied.

SALES—BREACH OF WARRANTY OF QUALITY—DAMAGES.—The measure of damages in a suit for breach of warranty of quality of goods sold is generally the difference between the value of the goods furnished and their value as they had been warranted: *Voorhees v. Earl*, 2 Hill, 288; 38 Am. Dec. 588, and note; *Passinger v. Thorburn*, 34 N. Y. 634; 90 Am. Dec. 753, and note; *Lewis v. Rountree*, 79 N. U. 122; 28 Am. Rep. 309, and note; adding thereto an allowance for any expense the plaintiff may have incurred in his business because of the breach of warranty together with interest: *Fisk v. Tank*, 12 Wis. 276; 78 Am. Dec. 737, and note.

SALES OF SEED—WARRANTY OF QUALITY—DAMAGES FOR BREACH.—Where seed is warranted as to quality, and the vendor knows the use to be made of the seed, he is answerable for the difference between the value of the product of the seed sold, it being put to the use specified, and the value of the product that would have resulted had the seed corresponded to the warranty: *Wolcott v. Mount*, 38 N. J. L. 496; 20 Am. Rep. 425, and note; 36 N. J. L. 262; 13 Am. Rep. 438, and note; *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13, and note; 78 N. Y. 393; 34 Am. Rep. 544, and note. The measure of damages in such a case where the seed proved totally unproductive is the value of a crop from the kind of seed represented: *Van Wyck v. Allen*, 69 N. Y. 61; 25 Am. Rep. 136, and note. On a breach of warranty on the sale of seed the measure of damages is the purchase money with interest and the expense of cultivation not including prospective profits: *Butler v. Moore*, 68 Ga. 780; 45 Am. Rep. 508.

EX PARTE MAIER.

[108 CALIFORNIA, 478.]

HABEAS CORPUS.—If a COMPLAINT UPON WHICH A CONVICTION HAS BEEN HAD DOES NOT STATE A PUBLIC OFFENSE the prisoner is entitled to his discharge.

GAME LAW—CONSTRUCTION OF AS TO GAME KILLED BEYOND THE STATE.—

If a statute declares that every person in the state who shall at any time sell, or offer for sale, the hide or meat of any deer, elk, antelope, or mountain sheep, shall be guilty of a misdemeanor, its application extends to, and includes, the selling of the hide or meat of any of such animals, though lawfully killed beyond the state.

GAME LAWS.—In the exercise of the police power of the state it may prohibit the taking of wild game and any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good, and to this end may make it criminal for any person to sell, or offer for sale, any of such game, whether killed within or without the state.

GAME LAWS—INTERSTATE COMMERCE.—A statute making it criminal for any person to sell, or offer for sale, the hide or meat of certain specified

wild animals, though applicable to such animals lawfully killed out of the state, is not invalid as an attempted and forbidden regulation of interstate commerce. At all events a conviction under the statute may be sustained if the article sold, though imported into the state from another, was not in the original package.

Hunsaker, Goodrich & McCutchen, for the petitioner.

District Attorney H. C. Dillon and Deputy District Attorney M. W. Conkling, for the respondent.

⁴⁷⁹ VAN FLEET, J. Petitioner was arrested and is held in restraint under a warrant issued out of the police court of the city of Los Angeles, based on a complaint charging him, under section 626 of the Penal Code, with unlawfully selling on the eighteenth day of December, 1893, at said city, a quantity of deer meat, which meat, the complaint alleges, "was then and there by said Simon Maier, cut from the carcass of an entire deer, which said deer had been theretofore brought by said Simon Maier from the state of Texas, in which state said deer had been lawfully killed." Petitioner asks for his discharge on *habeas corpus*, upon the ground that the complaint does not state a public offense, and, if that be true, there is no question but that he is entitled to his discharge in this proceeding: *Ex parte Corryell*, 22 Cal. 179; *Ex parte Harrold*, 47 Cal. 129; *Ex parte Kearny*, 55 Cal. 212.

Section 626 is one of the provisions of the Penal Code for the preservation and protection of the wild game of this state, and the particular paragraph or subdivision of the section under which petitioner is charged (as amended, Stats. 1893, p. 280) reads: "Every person in the state of California who shall at any time sell, or offer for sale, the hide or meat of any deer, elk, antelope, or mountain sheep, shall be guilty of a misdemeanor." Petitioner contends that this provision of the statute, properly construed, does not prohibit the sale of deer meat lawfully taken without the state, but has reference solely to deer killed within this state; that the law is intended to protect game within the state, not to prohibit the importation and sale of game from other states. With this contention we are unable to agree. It is true the law is intended for the protection of the game within the state, but it by no means follows from that fact that it is not the intention, as a means to accomplish that very end, to prohibit the sale of the ⁴⁸⁰ meat of the animals procured elsewhere. The statute is perfectly plain and unambiguous in its terms, and is sufficiently broad and comprehensive to include the in-

hibited article wheresoever taken or procured. It does not confine itself, in terms or by implication, to the meat of deer killed in this state, but denounces as unlawful the sale of the meat of any deer; and there is nothing in the statute tending to give it a more restricted sense. The language is too plain to leave room for construction, and we are not at liberty, even if so disposed, to place a limitation upon the meaning of the legislature which its language will not support. But we have no doubt that the legislature intended exactly what its words import. Aside from the explicit language in which this particular provision is couched, an examination of the various changes which these sections of the code relating to protection of game have undergone at the hands of the legislature is persuasively convincing of the intention to do just what this act does by its terms, entirely prohibit traffic in the meat of these game animals within the state, no matter where killed. And it need hardly be suggested that such a provision, if enforced, will lend great aid to the attainment of the object sought. The facility and ease with which the statutes for the protection of game have been evaded in the past is a matter of common knowledge. Deer and other game have been slaughtered during the close season and foisted upon the market as game procured without the state, and, owing to the practical impossibility in the great majority of cases of proving with certainty the source from which it was procured, the attempted enforcement of the statutes for its protection has largely proven abortive. These and like considerations no doubt actuated the legislature in the premises, and induced the enactment of the statute in its present stringent form. And we know of no good reason why it should not be held to mean what it says. Similar statutes in other states have received a like construction. In *Magner v. People*, 97 Ill. 331, involving a ⁴⁸¹ statute of Illinois making it unlawful to sell or have in possession quail and certain other game birds during the close season, and which was not in terms limited to birds taken in the state, it was contended, as here, that the statute did not condemn the possession or sale of the birds taken and killed beyond the limits of the state, and shipped into the state for sale. But the court held that the statute must be taken as comprehending within its terms the prohibited game, no matter where taken. It is there said: "But it is argued that this cannot be the fair construction, because such a prohibition does not tend to pro-

tect the game of this state. To this there seems to be two answers: 1. The language is clear and free of ambiguity, and in such case there is no room for construction—the language must be held to mean just what it says; 2. It cannot be said to be within judicial cognizance that such a prohibition does not tend to protect the game of this state. It being conceded, as it tacitly is, by the argument, that preventing the entrapping, netting, ensnaring, etc., of wild-fowl, birds, etc., during certain seasons of the year, tends to the protection of wild-fowl, birds, etc., we think it obvious that the prohibition of all possession and sales of such wild-fowl or birds during the prohibited seasons would tend to their protection, in excluding the opportunity for the evasion of such law by clandestinely taking them, when secretly killed or captured here, beyond the state, and afterward bringing them into the state for sale, by other subterfuges and evasions.”

The court of appeals of New York held to the same effect under a statute very like ours, saying: “The penalty is denounced against the selling or possession after that time [close of the open season] irrespective of the place of killing”: *Phelps v. Racey*, 60 N. Y. 10; 19 Am. Rep. 140. In *Whitehead v. Smithers*, 2 C. P. Div. 553, Lord Coleridge held that, under an English statute for the protection of British game which made it unlawful to sell or have in possession plover during the close season, a party who imported the dead birds from Holland and ⁴⁸² sold them in the British market came within the prohibition of the statute, and said: “It is said it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill birds. But it may well be that the true and only mode of protecting British wild-fowl from indiscriminate slaughter, as well as protecting other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild-fowl from being improperly killed, and sold under the pretense of their being imported from abroad”: See, also, *State v. Judy*, 7 Mo. App. 524, and *State v. Farrell*, 23 Mo. App. 176.

The cases relied upon by petitioner are clearly distinguishable from the cases referred to above. In most of them, as in *Commonwealth v. Hall*, 128 Mass. 410, 35 Am. Rep. 387, and *People v. O'Neil*, 71 Mich. 325, the statutes under consideration contained a provision making possession of the game during the close season *prima facie* evidence of a vio-

lation of the law, and the construction of the prohibitive features of the statute largely turned upon the effect of that provision. In *Commonwealth v. Hall*, 128 Mass. 410, 35 Am. Rep. 387, which is followed by the Michigan case, it is said: "Saying that possession should be *prima facie* evidence necessarily implies that it shall not be conclusive; if the mere possession of birds, during the time within which the taking or killing them is prohibited, of itself constituted an offense under the previous sections of the statute, to say that such possession would be *prima facie* evidence would be superfluous, if not absurd." And it is held that the statute must, therefore, be construed as referring only to game unlawfully taken within the state during the close season. As suggested by counsel for the people, our statute contained a similar provision up to 1883, when the legislature, by an amendment (Stats. 1883, p. 80), eliminated it, thereby evincing an intention to remove from the law any thing calculated to qualify or limit its otherwise plain and explicit terms. We have no doubt that the intention ⁴⁸³ of section 626 is to prohibit the sale of deer meat brought from without, as well as that taken within, the state.

Nor do we think that in giving the act this effect it contravenes the constitution of this state as being in excess of the police power of the state. The wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good. To this extent it is conceded that the state may go. But it is contended that to go further, and prohibit the sale of game lawfully killed elsewhere and brought here as private property, is in effect to destroy private property, and that this is going beyond a proper exertion of the police power. While it is true that the power to regulate is not the power to destroy, in its absolute sense, it is, nevertheless, true that the right to regulate frequently and as a necessary sequence carries with it the right to so control and limit the use or enjoyment of private property as to amount to its destruction. In the case of *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140, the same objection was raised, and it is there said: "The objection of a want of power in the legislature to pass the act is not ten-

apiece, representing them to be of the varieties and in the proportions ordered, and so labeled them. The plaintiff did not know, and had no means of ascertaining, whether or not the trees were such as ordered, until after he had planted them and had cultivated them about two years, when they first bore fruit, and therefore relied solely upon the representations of the defendant as to the varieties of the trees. When the trees first bore fruit it appeared that two hundred and sixty-eight of them were of a different and inferior variety from either of those ordered, and were of a kind that plaintiff did not desire, and which, when planted, occupied about two and one-half acres of plaintiff's land.

The object of this action was to recover damages alleged to have been suffered by plaintiff in consequence of a breach of the warranty that the trees were of the kinds ordered.

The judgment was in favor of plaintiff for three hundred and fifty dollars, from which, and from an order denying his motion for a new trial, the defendant appeals.

The principal point contended for by appellant is that the court did not measure the damages by the proper rule, which they say is that expressed by section 3313 of the Civil Code, as follows:

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facts of that case, since the delivery, the breach of warranty, and presumable notice of such breach, concurred in point of time; and it would have been equally correct to have said in that case that the measure of damages was the difference in values, etc., at the time of the breach of the warranty, or at the time the breach was discovered. But the court did not say, and surely did not intend to be understood as meaning, that all warranties of the class specified in section 3313 of the Civil Code refer to the time of delivery of the property, since such a construction would not only be contrary to the common law as administered in the United States and England, but would effect rank injustice in a large class of cases, of which the case at bar is an example: Sutherland on Damages, secs. 673-676; Sedgwick on Damages, secs. 191, 768, and cases cited. Under such construction the measure of plaintiff's damages in this action would be merely the difference between the value of the trees delivered and the same number of trees of the kinds ordered at the time of delivery, and before they were replanted by plaintiff. And so it would be in all cases of warranty of seeds.

⁴¹⁹ As to whether a warranty of this class refers to the time of the breach thereof, it is enough to say that if cases ever occur in which the purchaser suffers damage after the breach and before the time when he discovers, or with ordinary care and attention might discover, the defect in the property warranted, the warranty does not in such cases refer to the time of the breach, but to the time when the defect was or might have been discovered. The time of the breach depends upon the nature and meaning of the warranty. What was warranted? In this case I am inclined to the opinion that the defendant warranted that the trees would bear the kinds of fruit known by the names Susquehanna, Muir, and Solway peaches. If so, the breach occurred when they first bore a different kind of fruit, so that here again the breach and the discovery thereof were concurrent events. But if such is not the meaning of this warranty the breach must have occurred at the time the trees were delivered.

But since it seems probable that cases of the class specified in section 3313 of the Civil Code may occur in which the breach and the discovery thereof are widely separate in point of time, the only reasonable construction of that section which may have a uniformly just effect is, that the time to which

which merely affects ⁴⁸⁶ or influences and that which regulates or furnishes a rule for conduct." And in the celebrated cases commonly designated as *The License cases*, 5 How. 504, it is held that the fact that a regulation may incidentally, and to a certain extent, affect commerce between the states, does not affect its validity. In *Pierce v. New Hampshire* (one of the License cases), 5 How. 554, Mr. Justice Woodbury, in one of the opinions of the majority of the court, in discussing this power of the states, says: "The subject of buying and selling within a state is one as exclusively belonging to the power of the state over its internal trade as that to regulate foreign commerce is with the general government, under the broadest construction of that power." "The idea, too, that a prohibition to sell would be tantamount to a prohibition to import, does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and also, if a merchant, extensively engaged in commerce, often does import articles, with no view of selling them here, but of storing them for a higher and more suitable market in another state or abroad." In the subsequent case of *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465, the same court held a statute of Iowa, which forbade any common carrier to bring into the state for any person or corporation any intoxicating liquors from any state or territory, void, as being an unwarrantable interference with interstate commerce, and not a legitimate exercise of police power, in that it was more than a regulation of its own internal affairs, or an exercise of the jurisdiction of the state over persons and property within its limits: "It is an attempt," say the court, "to exert that jurisdiction over persons and property within the limits of other states. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation of commerce before the merchandise is brought to its border. . . . It is not a regulation confined to the purely internal and domestic commerce of ⁴⁸⁷ the state. It is not a restriction which only operates upon property after it has become mingled with, and forms part of, the mass of the property within the state. . . . But the right to prohibit sales, so far as conceded to the states, arises only after the act of transportation has terminated, because the sales which the state may forbid are of things

within its jurisdiction." And it is held that the state cannot, under the guise of a police regulation, prevent the importation of legitimate articles of commerce and trade. And in the later case of *Leisy v. Hardin*, 135 U. S. 100, it was held that it not being within the power of the state to prohibit the importation of lawful commodities, neither can she prohibit the sale by the importer of such commodities upon their receipt by him, since the right to sell any article imported was an inseparable incident to the right to import it. But this right of sale was distinctly limited to the right of the importer to sell or dispose of the article imported in its original, unbroken package, or condition as brought by him into the state, and the principle is in that case, as in *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465, and the other cases cited distinctly upheld, that the authority of Congress over any article of commerce imported into a state ceases "when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands," and that thereupon the property becomes subject to the jurisdiction of the state, and affected and controlled by its regulations. Tested by these principles we cannot see wherein the statute, applying its provisions to the case made in the complaint, is open to the objection that it attempts to, or does, regulate interstate commerce. Petitioner imported the meat into the state, broke the original package, and put the commodity upon the market. It thereupon became property strictly subject to state regulation and control, and falls within the denunciation of the statute. Whether petitioner could have sold the meat as an entire carcass is a question which does not ⁴⁸⁸ confront us, and which it is not, therefore, necessary to determine.

We think the complaint states a public offense, and it follows that the petitioner should be remanded.

It is so ordered.

McFARLAND, J., GAROUTTE, J., HARRISON, J., BEATTY, C. J., and FITZGERALD J., concurred.

DE HAVEN, J., being absent, did not participate in the foregoing decision.

HABEAS CORPUS — DISCHARGE ON, WHEN PROPER. — When the facts charged in a complaint or indictment do not constitute a public offense the defendant will be discharged on *habeas corpus*: *Ex parte McNulty*, 77 Cal.

164; 11 Am. St. Rep. 257; *Ex parte Prince*, 27 Fla. 196; 26 Am. St. Rep. 67, and the extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 110.

Game Laws.

The inclination of the judiciary is beyond question to sustain, if possible, all laws, whether state or national, for the preservation of game and fish. The case of *Lawton v. Steele*, 119 N. Y. 226, 16 Am. St. Rep. 813, affirming the power of the legislature to declare that any net found, or any other means or device, for the taking or capturing of fish, set, put, floated, had, found, or maintained in or upon any of the waters of the state, in violation of the existing statutes for the protection of fish, is a public nuisance, and may be abated as such, and summarily destroyed by any person, was sustained upon appeal to the supreme court of the United States by a judgment of a majority of that court in an opinion reported in 152 U. S. 133. In this opinion the statute assailed was sustained as a lawful exercise of the police powers of the state, and it was said that "the preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed and exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts."

The judicial inclination to which we have referred has extended to instances which necessarily involved the denial of the right to have or use private property where its possession or use, if sustained, might conflict with the laws for the preservation of game and fish, and afford opportunity for the evasion thereof. Thus in the case of *People v. Bridges*, 142 Ill. 30, a statute declaring it to be unlawful for any person to catch or kill any fish with a seine or other device used as a seine, in or upon any of the rivers, creeks, ponds, lakes, bayous, or other watercourses wholly within or running through the state, except between the first day of July of each year and the first day of April of the following year, was held to extend to a body of water, which, though connected with a river, was wholly situate upon the lands of a private proprietor by whose consent the use of a seine on such waters was made. The court held that, while the statute was general in its terms, it could not be interpreted as excluding from its provisions the waters in question, though they were situate upon private property and therefore the subject of private ownership; and next considered the question whether, if the statute were construed as including those waters, it would be obnoxious to any constitutional objection. Upon this subject the court said: "The power of the legislature to pass laws for the protection and preservation of fish in the waters of this state has been so frequently exercised in this and other states, and such exercise has been so long and so uniformly acquiesced in, that the existence of the power at the present day is scarcely open to question." The court admitted that the precise question had not previously arisen for decision, but in sustaining the statute it relied upon the general rule that "no one has a property in the animals and fowls denominated 'game' until they are reduced to possession. Whilst they are untamed and at large the ownership is said to be in the sovereign authority—in Great Britain, in the king, but with us, in the people of the state. The policy of the common law was to regulate and control the hunting and killing of game for its better preservation; and such regulation and control, according to Blackstone, belonged to the police power of the government. The ownership being in the people of the state—the representative of the sovereign author-

ity—and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt or kill game, or qualify or restrict it as in the opinion of its members will best subserve the public welfare. Stated in other language, to hunt or kill game is a boon or privilege granted either expressly or impliedly by the sovereign authority, not a right inhering in the individual, and, consequently, nothing is taken away from the individual when he is denied the privilege at stated seasons of hunting and killing game.”

In Massachusetts a statute imposing a penalty for selling trout, but declaring that fishes artificially propagated or maintained should be the property of the person propagating or maintaining them, and that he might take them in his own waters at his pleasure, and might sell them for purposes connected with their culture and maintenance for food at seasons when their capture is prohibited by law, was held to be constitutional and to be applicable to trout cultivated and raised by a private proprietor. The court said: “In order to make the protection of the trout more effectual, it was deemed necessary by the legislature to punish the sale during the close season of all trout except those which are alive. This was probably on account of the difficulty in distinguishing between trout which had been artificially propagated and maintained and other trout.” Considering the constitutionality of the statute the court said: “Nor have we any doubt that the statute is constitutional. The importance of preserving from extinction or undue depletion the trout, and other useful fishes, in the waters of the commonwealth, has been recognized and illustrated in many familiar statutes and decisions from an early time. Such protection has always been deemed to be ‘for the good and welfare of this commonwealth,’ and the legislature may pass reasonable laws to promote it. Such laws are not to be held unreasonable because owners of property may thereby to some extent be restricted in its use. It has often been declared that all property is acquired and held under a tacit condition that it shall not be so used as to destroy or greatly impair the public rights and interests of the community. Many instances might be cited where such restrictions on the use of property have been held valid. But the cases are familiar. The limitation is that the restrictions must not be unreasonable. The legislature may forbid the catching or selling of useful fishes during reasonable close seasons established for them; and to extend the prohibition so as to include such as have been artificially propagated or maintained is not different in principle from legislation forbidding persons from catching fish in streams running through their own lands. The statute under consideration falls within this power”: *Commonwealth v. Gilbert*, 160 Mass. 159.

In Oregon the statute provides for a close season with respect to certain fish, but this season varies in different parts of the state, and makes it unlawful for any person to receive, have in possession, or to offer for sale or transportation, during the close seasons named in the act any of certain varieties of fish. Under such statute the question presented for decision was: “Does the statute prohibit a person from having in his possession or offering for sale during the close seasons named in the act fish of the varieties mentioned which were caught in any of the rivers enumerated during their open seasons? The construction which the trial court gave to the statute by its rulings on the evidence and its instruction to the jury was, that ‘it is unlawful for a person to have in his possession, or offer for sale, during the close season on the Columbia, fish of the kind named in the act, no

matter where they were caught or taken, or when they were caught or taken.' In this view it was no defense that such fish were caught in the Umpqua or Columbia rivers during the open seasons specified in the statute, when it was lawful to catch them, if the defendants had such fish in their possession, or offered them for sale, during the close season on the Columbia. Hence, as in the cases of the defendants McGuire and Barnes, fish caught during the open season on the Columbia, when it is lawful to catch them, and placed in cold storage for their preservation, or, as to that matter, put up in salt or cans, cannot lawfully remain in the possession of the owner, or be offered for sale, during the close season on that river, or, as in the case of the defendant Covach, it would be unlawful for a party to have in his possession, or offer for sale, fish caught during the open season on the Umpqua, when it is lawful to catch them, if it happens to be the close season on the Columbia. Under this construction of the statute a party who has in his possession such fish, or who offers them for sale, although lawfully caught, whether in or out of the state, and his private property, is liable to punishment, and his property rendered worthless or destroyed. Nor is this all. Salmon caught on Friday night or Saturday morning, which may come into the cannery or market at six o'clock Saturday evening — the commencement of the close season each week — must be immediately destroyed, or the party having them in his possession, or offering the same for sale, during such weekly close season, will be exposed to prosecution and punishment. A statute which leads to such consequences ought not only to be clear, but mandatory, and the act done under it not only within the letter, but within the spirit, of the law, to authorize its enforcement.

"This construction, however, counsel for the state insist must be given to the statute, to make it effective, and carry out the purpose of the law. Their contention is that the object of the statute is to protect such fish during the close season in order that they may have an opportunity to propagate their species, and be preserved from extermination, and that if any other construction is adopted, fish could be caught in the open season in such numbers as to supply the market during the close season by putting them in cold storage until wanted, and by so doing the stock of fish would be seriously impaired, or exhausted, and but a few or none would be left to propagate their kind, and, finally, that such a construction is necessary to prevent evasion of the statute, and make the proof of its violation easy and accessible. Hence they argue that the fact of the fish being caught in a lawful season constitutes no defense, so that the time and place when and where such fish were caught are not material. In support of this view they assert that the same principle governs as in those cases where game has been lawfully killed in one state, and exposed for sale in another, during the prohibited season in the latter state. This principle perhaps finds its best illustration in *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140, where a statute declared that no person should expose for sale, or kill, or have in his possession after it had been killed, any quail or other game, between the first day of January and the twentieth day of October. The defendant was indicted for having quail in his possession in March. He had invented an apparatus to preserve game, and that which he had in his possession, and specified in the complaint, was killed in New York in the open season, or received from Minnesota or Illinois, where the killing at the time was legal, and put up by him in his apparatus in the month of December. Church, C. J., said: 'The language of these sections is plain and unambiguous;

hence there is no room for construction. It is a familiar rule that, when the language is clear, courts have no discretion but to adopt the meaning which it imports. The mandate is, that "any person having in his or her possession," between certain dates, certain specified game killed, shall be liable to a penalty. The time when, or the place where, the game was killed, or when brought within the state, or where from, is not made material by the statute, and we have no power to make it so. . . . That it was either killed within the lawful period, or brought from another state where the killing was lawful, constitutes no defense. The penalty is denounced against the selling or possession after that time, irrespective of the time or place of killing.'

"In *Magner v. People*, 97 Ill. 320, among other things, Scholfeld, J., says: 'We think it is obvious that the prohibition of all possession and sales of such wild-fowls or birds during the prohibited seasons would tend to their protection, in excluding the opportunity for the evasion of such law by clandestinely taking them, when secretly killed or captured here, beyond the state, and afterwards bringing them into the state for sale, or by other subterfuges and evasions. It is quite true that the mere act of allowing a quail netted in Kansas to be sold here does not injure, or in anywise affect, the game here; but a law which renders all sales and all possession unlawful will more certainly prevent any possession or any sale of the game within state than will a law allowing possession or sales here of the game taken in other states. This is but one among many instances to be found in the law where acts, which in and of themselves alone are harmless enough, are condemned because of the facility they otherwise offered for a cover or disguise for the doing of that which is harmful': See, also, *State v. Randolph*, 1 Mo. App. 15; *Game Assn. v. Durham*, 51 N. Y. Sup. Ct. 306; *Whitehead v. Smithers*, 21 Moak's Eng. Rep. 458.

"It is also held that such statutes are not in conflict with the constitutional provision that no person shall be deprived of his property without due process of law, and are not regarded as an interference with interstate commerce: *Phelps v. Racey*, 60 N. Y. 10; 19 Am. Rep. 140; *State v. Randolph*, 1 Mo. App. 15. But there are other decisions, later in point of time, holding a contrary doctrine, which cannot be wholly reconciled by the difference in the language of the statutes. In *People v. O'Neil*, 71 Mich. 325, it was held that the possession of game killed in another state is not an offense under the Michigan act of 1881, which makes it an offense to have game in possession for the purpose of sale, during a certain period of the year, since the purpose of the act as shown by the title is the protection of game within the state. Champlin, J., after reviewing the authorities already referred to, said: 'A construction of a statute which leads to such harsh consequences, and punishes with severe penalties acts which are confessedly innocent in themselves, must not only be unambiguous, but mandatory; and the act done must not only be within the letter, but within the spirit, of the law to gain my assent to its enforcement. Our statute requires no such strict construction. The articles interdicted are articles of food, and the interdiction is not because such food is unwholesome, and therefore detrimental to health, but the whole end and object of the legislation is to protect and preserve the game of Michigan. . . . The various provisions of the act are all directed to that purpose. And how it can be held that this law is violated, either in letter or spirit, by importing game from other states to supply food to citizens of this state, is a point I am unable to understand. The only ground upon which such construction is

attempted to be defended is that it prevents evasion of the statute; that game might be killed in this state in violation of law, and shipped to another state, and there reshipped into this state, and the prosecution might be unable to prove that it was Michigan game killed in violation of law. That may disclose a defect of proof; but I submit it does not apply to cases where the fact is conceded or proved to the satisfaction of the jury that the game was not killed, in the violation of law.' In the same case Campbell, J., said: 'Concurring, as I do, in the meaning of our statutes, as explained by my brother Champlin, I do so for the further additional reason that I do not think it would be competent for our legislature to punish the possession of game which was lawfully captured or killed. Having become lawful private property it cannot be destroyed or confiscated, unless it becomes unfit for use, any more than other property can be destroyed. I do not think the cases to the contrary are reasonable or sound. While, in England, the power of parliament cannot, perhaps, be questioned by courts, there is no such rule here, and I cannot see on what principles such decisions are maintainable. It is not competent for any American statute to raise conclusive presumptions of guilt in any case. This is well settled. When the possession is traced back of the time when it became unlawful to take game the presumption has no further force as evidence, and what was then lawful cannot be made a crime by lapse of time only.'

"In *Commonwealth v. Wilkinson*, 139 Pa. St. 304, in construing an act which provides that 'No person shall kill, or expose for sale, or have in his possession after the same has been killed, any quail between the fifteenth day of December in any year and the first day of November following,' Paxton, C. J., said: 'The manifest object of this act was the preservation of game within this commonwealth. We cannot assume that it was intended to preserve game elsewhere, and it would be a forced construction to hold that it was intended to exclude from our markets quail and other game killed in other states, where by the laws of those states the killing of them was lawful. . . . The law was not intended to have any extraterritorial effect, and, if it was, it would be nugatory. . . . The construction claimed for the act by the commonwealth would render any one a criminal who lawfully killed quail in another state, and brought them here for his own use. It would be *prima facie* evidence of a violation of the act, and, if he could not show as a defense that he killed them outside the commonwealth, he would have no defense at all. The matter is too plain to require elaboration.' In *Allen v. Young*, 76 Me. 80, it was held that where a statute made it an offense to kill deer at a certain time, or to transport them from place to place during that time, it was not an offense to transport from place to place during the prohibited season deer killed before: See, also, *Commonwealth v. Hall*, 128 Mass. 410; 35 Am. Rep. 387; *Davis v. McNair*, 7 Crim. Law Mag. 219; 21 Cent. L. J. 480.

"In these cases the courts held that the object of the act was to protect game in the state, as indicated by the title, and that the statute sought to attain this object by punishing the taking or killing of such game in the state during the prohibited seasons, or the offering for sale, or having in possession, in the state, during such times, of game so taken or killed. So that if the killing or taking of game in the state was at a time when it was lawful, under the statute, to do so, the offering for sale, or having in possession, of game so taken or killed, was not an offense against the statute. If our statute will bear this construction, then it was only intended to prevent the taking or catching of the salmon specified, on the rivers enu-

merated, within the state, during their close seasons, and to render unlawful, or make a misdemeanor, the offering for sale, or having possession of, salmon so taken or caught on such rivers in this state during such close seasons. In this view, the offering for sale, or having possession of salmon during the close seasons, which had been lawfully taken or caught, is not an offense. The trial court, however, construed the act differently, holding, as indicated by its instruction, that the offering for sale, or having possession of the fish mentioned in the complaint, during the close seasons named in the act, was a misdemeanor 'no matter where the same were caught or taken, or when they were caught or taken.' So, also, the ruling of the court that the proof offered by the defendants, viz., that the fish in question were caught during a lawful season was immaterial, was based on the theory that the time when and place where the fish were caught was not made material by the statute, and, therefore, constituted no defense. The effect of this construction is to declare that, in order to protect the salmon in this state, it was the intention of the statute to punish the offering for sale, or the having in possession of salmon of the varieties specified, during the prohibited seasons, no matter whether they were lawfully caught within or without the state; in a word, that it was the intention of the legislature to punish the mere possession of salmon which had been lawfully caught or taken. It ought to require plain, unambiguous, and mandatory language to justify any court in declaring fish or game lawfully caught or taken to be the subject of an offense, by the simple possession of it. A construction leading to such injustice ought to be avoided, if it can be reasonably done.

"Salmon fish is an article of food, and the law interdicting the catching of them at certain seasons is not because they are unfit for use or unwholesome, but to protect and preserve such fish in this state. The constitution requires the object of every act to be expressed in its title. The object of the act, as expressed by the title, is to protect salmon in the state of Oregon. All its provisions are directed to this purpose. None of them would be violated by bringing fish which had been lawfully caught in other states into this state. Is it violated by offering for sale or having in possession fish during the prohibited seasons which had been caught in the open seasons on the river, when it was lawful to do so? Certainly, if the legislature intended to declare the mere possession of such fish during the close season an offense, no matter where or how lawfully caught or taken, words could easily have been found to express such intention. The section on which the indictment is found reads: 'It shall be unlawful for any person or persons to receive, or have in possession, or offer for sale, etc., during the close seasons named in the act, any of the following varieties or kinds of fish, which may be caught in any of these streams as aforesaid, viz., chinook salmon,' etc. A violation of this section involves the catching of such fish in the streams enumerated in the act, and contrary to the provisions of such act. 'Which may be caught in any of these streams as aforesaid,' is the language of the section. The words 'as aforesaid' do not relate to the streams themselves, but to the time or manner of taking fish from them. 'As' qualifies 'caught,' making the sentence read, by the transposition, 'caught as aforesaid in any of these streams,' and means fish caught during the close seasons aforesaid in any of these streams. This is in accordance with the grammatical relation of the words. On the other hand, if these words relate to the 'streams,' and the construction of the act is as claimed by the prosecution, then a party having in possession, or offering for sale, during the close season upon the Columbia river, fish of the variety described in the complaint, no matter what their condi-

tion, where or how lawfully they were caught, is guilty of a crime. In the case before us, when the fish were caught in the rivers of this state, according to the conceded facts, it was lawful to do so, and when so caught and reduced to possession of the party, they became his property, and he could deal with them in the same way as with any other personal property. Having become his lawful private property, must he subsequently, when such fish are wholesome, and not detrimental to the public health, destroy them, or be exposed to punishment for having the same in his possession? To subject a party to such an alternative involves an absurdity and injustice that we are bound to avoid, if the act is susceptible of another construction.

"The rule is well established that 'where the language of the legislature is fairly susceptible of two different meanings, that should be preferred which excludes and prevents consequences that are mischievous and unjust.' In *Code's case*, 3 Out. App. 550, Lord Justice Bramwell said: 'When a particular construction of an act of parliament, or a particular proposition of law, leads to hardship, there is a presumption against that construction or proposition being right, because I do not think our law does, usually at least, lead to hardship'; *In re Hooper*, 11 Ch. Div. 322. So that, if the language of the statute was susceptible of two constructions, it would be our duty to adopt that construction which would avoid unjust consequences. But we do not think such is the case here. Looking at section 6, as amended, it would seem that it was to avoid the construction contended for by the prosecution that the legislature modified the otherwise absolute provision of section 6 by the use of the words, 'which may be caught in any of these streams as aforesaid.' The statute, as it stands, was only intended to prevent the catching of the varieties of fish specified during the protected seasons on the rivers enumerated in the statute, and to render unlawful the offering for sale, or having possession of, such fish so caught in the state during the close seasons. The indictment is drafted upon this construction of the statute. The defendants are charged by it with having in their possession or offering for sale during the close season certain fish, viz., steel-head salmon, caught in the Columbia river contrary to the statute. Steel-head salmon are caught in the Columbia river contrary to statute only during the close seasons on that river. It is not in contravention of the statute to catch such fish during the open seasons on the Columbia or other rivers enumerated. No offense, therefore, according to the admitted facts, was committed when the fish were in fact caught, and consequently the defendants did not have in their possession, or offer for sale, fish caught contrary to the statute. In view of these considerations, we think, before a conviction can be had under the statute, it must appear that the defendants had in their possession, or offered for sale, during the close seasons mentioned therein, the kinds of fish specified, which had been caught during the close season from the streams in such statute enumerated. It results that the judgment of conviction in each of the above-entitled cases must be reversed and a new trial ordered. Reversed"; *State v. McGuire*, 24 Or. 370.

HERMAN v. SANTEE.

[103 CALIFORNIA, 519.]

JUDGMENT WITHOUT ENTRY OF DEFAULT.—The only purpose of the entry of a default is to limit the time during which the defendant may file his answer, and, as that time never extends beyond trial and judgment, a judgment rendered without any entry of default is neither void nor erroneous.

A JUDGMENT ENTERED WHEN THE PROOF OF THE SERVICE OF PROCESS WAS DEFECTIVE AND INSUFFICIENT is not void if service of such process had in fact been made before a judgment was rendered. It is the fact of service which gives the court jurisdiction, not the proof of service.

JUDGMENT, AMENDED PROOF OF SERVICE OF PROCESS.—If the proof of service of process on file when a judgment is entered is insufficient, and a motion is made to vacate such judgment because of that insufficiency, the plaintiff may meet such motion by a counter-motion to be permitted to file, *nunc pro tunc*, as of the date of the judgment, amended proof of such service, and, his motion being granted on the proof filed, the motion to vacate the judgment should be denied.

NOTICE OF MOTION IS WAIVED if the party is in court at the time the motion is made, and, without objecting to the want of notice, proceeds to argue the question involved, and when it is decided against him takes a general exception to the ruling.

David L. Withington and Works & Works, for the appellant.

Conklin & Hughes, for the respondent.

521 **BELCHER, C.** This action was brought to foreclose a mortgage given to secure payment of a promissory note made by the appellant, Milton Santee. On September 8, 1892, a decree of foreclosure was entered as prayed for, reciting that the "defendants have been duly and regularly summoned to answer unto the plaintiff's complaint herein, and made default in that behalf, and that the default of each defendant for not appearing and answering unto plaintiff's complaint has been duly and regularly entered herein." Subsequently appellant gave notice of a motion to vacate and set aside the decree, so far as it provided for a deficiency judgment against him, upon the ground that previous to the institution of the action he had been discharged from the indebtedness sought to be enforced by a discharge in insolvency. The motion came on to be heard on September 1, 1893, both parties being present in court by their attorneys. Before the hearing commenced the respondent, without any previous notice, presented to the court an amended affidavit of service of the summons and complaint in the case, and asked for an

order that the same be filed *nunc pro tunc* as of September 8, 1892, and made a part of the judgment-roll. The attorney ⁵²² for appellant objected to the order asked for, and stated that: "As the decision of the motion would in his judgment be decisive of the motion made to vacate the judgment by defendant Santee, he would like permission to introduce his authorities upon the motion before the court." Thereupon the motion was argued "at length," and during the course of the argument the attorney stated that he appeared as *amicus curiae*. After the argument was concluded the court granted the motion, and the appellant excepted to the ruling.

The appeal is from the judgment and the order granting respondent's motion.

The summons was served by a person other than the sheriff, and the affidavit of service, as originally made and returned, was defective and insufficient because it did not state that the affiant was over the age of eighteen years at the time of the service.

The appellant contends that because the affidavit of service was insufficient the clerk had no authority to enter the default, and the court had no jurisdiction to enter the judgment, and that both the default and judgment were void.

It is true that the clerk was a mere ministerial officer, and could perform only ministerial duties. Conceding, therefore, that, in the absence of due proof of the service of the summons, the clerk had no right to enter the default, still that fact is unimportant, and can cut no figure in the decision of the case. A valid judgment by default may be rendered by the court, though no formal default has been entered. "The only purpose of a default is to limit the time during which the defendant may file his answer, and that time never extends beyond a trial and judgment": *Drake v. Duenick*, 45 Cal. 463.

The important question then is, Was the judgment void? Section 416 of the Code of Civil Procedure declares that: "From the time of the service of the summons and of a copy of the complaint in a civil action, . . . the court is deemed to have acquired jurisdiction ⁵²³ of the parties, and to have control of all the subsequent proceedings." In *Pico v. Suñol*, 6 Cal. 295, it is said: "Jurisdiction of the person of defendant is acquired by the service of process, and dates from such service, and not from the return." And in *Drake v. Duenick*, 45 Cal. 463, it is said: "The fact of service was material,

and from the time service was made the court was deemed to have acquired jurisdiction. The return of service might be formal or informal, perfect or imperfect, still, if service were in fact made, the court acquired jurisdiction of the person of the defendant." So in *In re Newman*, 75 Cal. 220, 7 Am. St. Rep. 146, it is said: "It is the fact of service which gives the court jurisdiction, not the proof of service."

The amended affidavit of service which the court allowed to be filed was in all respects in proper form, and showed that the appellant was regularly served with a copy of the summons and complaint. None of the facts stated in the affidavit are controverted, and it must be held, therefore, that from the time of the service the court acquired jurisdiction of the parties to the action.

The question then arises, Did the court err in allowing the proof of service to be amended and filed *nunc pro tunc* as of the date of the judgment? Upon this subject Mr. Freeman, in his work on Judgments (4th ed., sec. 89 b), states the law as follows:

"If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is omitted or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid. Though the proof of the service of process does not consist of the return of an officer, the like rule prevails. Thus, if a summons has been published in the manner required by law, but the proof of publication found in the files ⁵²⁴ of the court is defective, the court may, on the fact of due publication being shown, permit an affidavit to be filed showing the facts, and, when so filed, it will support the judgment as if filed before its entry."

In opposition to this view and in support of his theory appellant cites *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, in which, on page 401, it is said:

"The default and judgment were void, not because there was no service, but because there was, at the time of entering the same, no proof of service."

This language is not in harmony with the weight of authority upon the subject, and, in our opinion, it does not state the law correctly. The case is reported in the Ameri-

can State Reports, volume 21, page 52, and, in a note commenting upon it, it is said:

"The court declares, in effect, that it is not the service of process which gives courts jurisdiction, but the proof of such service; that if the proof is defective it is immaterial that the service was perfect; and the proof being imperfect there is no way in which the judgment can be sustained by showing the facts regarding the service of process as they really existed when it was entered. The very reverse of this we apprehend to be the law. It is the fact of service of process which confers jurisdiction, and it is a familiar practice in California, as well as elsewhere, when the proof of such service is absent or defective, to permit it to be amended or supplied."

And again: "To support judgments entered upon insufficient proof of service of process, or without the proof of such service appearing in the record, courts have uniformly permitted such proof to be amended or supplied, not for the purpose of authorizing them to enter new judgments based upon such proof, but to show that judgments previously entered were not entered without jurisdiction, and are not, and never were, void," citing *Allison v. Thomas*, 72 Cal. 562, 1 Am. St. Rep. 89, and numerous other cases.

We conclude, therefore, in view of the authorities,⁵²⁵ that the judgment in question was not void, and the court did not err in permitting the amended affidavit of service to be filed.

It is further claimed that the application to file the amended affidavit was without notice, and the order authorizing the filing was therefore erroneous. But conceding that previous notice of the application should have been given, still we are unable to see that appellant was in any way prejudiced by the failure. He was present in court when the motion was made, and raised no such objection then. On the contrary, he proceeded to argue the question at length, and when it was decided against him took a general exception to the ruling. This was, in effect, a waiver of notice, and appellant cannot now be heard to complain of the action of the court on this ground.

We discover no prejudicial error in the record, and therefore advise that the judgment and order appealed from be affirmed.

SEARLS, C., and TEMPLE, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

GAROUTTE, J., HARRISON, J., VAN FLEET, J.

PROCESS—PROOF OF—AMENDMENT.—A sheriff's return of service of process may be amended after judgment so as to show jurisdiction over the defendant: *Allison v. Thomas*, 72 Cal. 502; 1 Am. St. Rep. 89, and note; *Shenandoah Valley R. R. Co. v. Ashby*, 86 Va. 232; 19 Am. St. Rep. 898, and note; *Deuar v. Spence*, 2 Whart. 211; 30 Am. Dec. 241, and note. Where a judgment by default has been rendered against a defendant served by publication of summons, upon an affidavit which fails to show sufficient publication, if the summons was in fact duly published, the plaintiff may file *anac pro tunc* a proper and sufficient affidavit of publication, provided it does not appear that it will be unjust to the defendant or injure the rights of third parties: *Burr v. Seymour*, 43 Minn. 401; 19 Am. St. Rep. 245, and note, with the cases collected. But in *Reinhart v. Lugo*, 86 Cal. 395, 21 Am. St. Rep. 52, it was held that a judgment by default, when the proof of the service of summons is defective, is void, and a motion to vacate it cannot be successfully resisted by proving that the summons was, in fact, properly served. Such proof cannot operate by relation to make valid a judgment void when it was entered. This case is commented upon in the note appended thereto, at pages 56 and 57, where it is declared to be without authority; and this comment is approved and the decision criticised is overruled in the principal case. There is a further discussion of this subject in the extended note to *Malone v. Samuel*, 13 Am. Dec. 173.

PROCESS—MISTAKE IN RETURN—WHETHER AFFECTS JUDGMENT.—Mistake in return of summons will not affect the judgment based upon such summons: *Evans v. Calman*, 92 Mich. 427; 31 Am. St. Rep. 606, and note; since the court acquires jurisdiction by fact of the service of summons, and not from the proof of service: *Burr v. Seymour*, 43 Minn. 40; 19 Am. St. Rep. 245.

EACHUS v. LOS ANGELES CONSOLIDATED ELECTRIC RAILWAY COMPANY.

[103 CALIFORNIA, 514.]

STREETS—DAMAGES FOR GRADING.—Under a provision in a state constitution declaring that private property shall not be taken or damaged for public use without just compensation having first been made, or paid into court for the owner, the proprietor of a lot in an incorporated city may recover for such indirect or consequential damages to his property as he may sustain over and above that sustained by him in common with other proprietors or the public in general. Whenever the enjoyment by plaintiff of some right in reference to the property is interfered with and thereby the property itself made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation.

STREETS, DAMAGES FOR GRADING.—If a street, by putting it on the official grade, is cut down in front of a city lot so as to prejudice the owner in

his ingress and egress to and from such lot, any damage sustained by him thereby is peculiar to himself, and independent of any injury sustained by the public generally. For the purpose of determining this damage it is immaterial whether he owns the fee in the street or only an easement for its use.

STREETS—DAMAGES FOR CHANGING GRADE.—IT IS ONLY WHEN THE MARKET VALUE of property is diminished by a public use that the property can be said to have sustained such damage as will entitle its owner to compensation.

STREETS, DAMAGES FOR CHANGE OF GRADE.—THE SAME RULE IS APPLICABLE WHEN A STREET IS THE FIRST TIME REDUCED TO AN ESTABLISHED GRADE as when a change in the grade has been made after the street has been brought to such grade. In any case, if the cutting results in a damage, rather than a benefit, to a lot, the owner is entitled to compensation for the amount of his damage.

STREETS, CHANGING GRADE OF.—The damages sustained by a lot-owner from a change of grade is caused by its actual grading, and not by the ordinance fixing the grade.

STREETS.—DAMAGES SUFFERED BY A LOT-OWNER in grading a street to the official grade by a railway corporation cannot be mitigated by proving that he will receive benefit from the construction and operation of its road.

STREETS.—THE DAMAGES WHICH A LOT-OWNER MAY RECOVER FOR GRADING A STREET includes all the damages which his lot has sustained by the act of the defendant, and such damage is complete when the grade is changed, and does not depend upon any subsequent use of the lot.

PRACTICE—OBJECTIONS TO EVIDENCE.—Unless evidence is not admissible for any purpose, a party is not at liberty under a general objection to afterwards urge a special objection going merely to the form of the question by which the evidence was sought.

John D. Pope, for the appellant.

Gulbreth & Morrison, for the respondents.

¶15 HARRISON, J. The plaintiffs are the owners of a lot of land in the city of Los Angeles, situate at the corner of First and Figueroa streets, having a frontage of one hundred and forty-two feet on First street, and fifty feet on Figueroa street. The lot is a portion of a larger tract of land which originally belonged to the municipality, and was laid out by it into blocks and streets in 1872. The plaintiffs became the owners of the lot in 1887, and built a house thereon, in which they lived for several years. In 1891 the defendant received a franchise from the city of Los Angeles to construct a railroad along First street in said city in front of the plaintiffs' property, and in preparing the street for the construction of its railroad made an excavation in the middle of the street to its official grade. The street is eighty-two and a half feet

in width, and §16 for the purpose of laying its tracks upon the official grade of the street the excavation made by the defendant in front of the plaintiffs' property was twenty-eight feet in depth at the corner, gradually diminishing to a depth of twenty feet at its rear, and extended to within ten feet of the boundary line of their lot fronting on the street. The ordinance conferring the franchise upon the defendant is not set forth in the record, and it does not appear whether there was any requirement that the track should be laid upon the official grade of the street; and, although it was admitted that, until the excavation made by the defendant, the street had never been changed from its natural grade, it does not appear from the record when the official grade was established. The plaintiffs brought this action to recover the damages caused to their lot by reason of the acts of the defendant in cutting off their access thereto. The cause was tried by a jury, and a verdict rendered in their favor for eight hundred and twenty-three dollars. The defendant has appealed.

The constitution of 1879, article I, section 14, provides that: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into, court for the owner." Prior to the adoption of this constitution it was held that an abutting owner was not entitled to compensation for any injury to his property resulting from a lawful change in the grade of the street fronting thereon; but in *Reardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep 109, it was held that this provision of the constitution gave him a remedy that he did not previously have, and authorized a recovery for such indirect or consequential damage to his property as he might sustain over and above that sustained by him in common with other abutters or the public in general. This provision does not exist in the constitution of many of the states, and it is only within a few years that it has been incorporated into the constitution of any state. Hence, the opinions of courts in other states which §17 were rendered at a time when no such rule of law existed are inapplicable, and apt to be misleading in their reasoning. The constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely render-

ing private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable, but this is not an injury to the property itself so much as an influence affecting its use for certain purposes; but whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation.

The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation; and any act by which this right is impaired is to that extent a damage to his property. When a city subdivides a tract of land of which it is the owner into blocks and streets, and sells the same, it thereby dedicates the streets to public use, and the purchaser of one of those lots acquires an easement in the street fronting upon his lot, for the purposes of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as in the lot itself; and any subsequent act of the municipality by which that easement is destroyed or substantially impaired, for the benefit of ^{the} public, is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation. Such easement is a right of property incident to the lot itself, and any damage sustained by the owner in its destruction or impairment is a damage peculiar to himself, and independent of any damage sustained by the public generally. For the purpose of determining this damage it is immaterial whether he has the fee in the street, or only an easement for its use. In either case it is property, for an injury to which he is entitled to relief: *City of Denver v. Bayer*, 7 Col. 113; *Rude v. City of St. Louis*, 93 Mo. 413; *Hobson v. Philadelphia*, 150 Pa. St. 595; *Schaufele v. Doyle*, 86 Cal. 107. *Rigney v. City of Chicago*, 102 Ill. 64, is a leading case on this subject. In that case the fee of the streets was in the city, and the city had constructed a bridge

or viaduct on a public street intersecting the street on which the plaintiff's lot fronted, and about two hundred and twenty feet distant from his lot, thus interfering with his access to that street, except by means of a flight of stairs; and his premises were thereby damaged and depreciated in value. The court held that the injury sustained by him in the prevention and impairment of free access to his lot was a damage for which the constitution gave him a right of recovery, and that in order to recover for the damage which private property had sustained for public use, "it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage, in excess of that sustained by the public generally, which by the common law would, in the absence of any constitutional or statutory provisions, give a right of action." The supreme court of the United States gave the same construction to that provision in the constitution of Illinois, in *Chicago v. Taylor*, 125 U. S. 161. Similar principles have been enunciated in other states whose constitution contains this provision: *City of Denver v. Bayer*, 7 Col. 113; ⁶¹⁹ *Sheehy v. Kansas City Cable Co.*, 94 Mo. 574; 4 Am. St. Rep. 396; *Hatch v. Tacoma etc. R. R. Co.*, 6 Wash. 1; *City of Atlanta v. Green*, 67 Ga. 386; *Lowe v. City of Omaha*, 33 Neb. 587; *Johnson v. Parkersburg*, 16 W. Va. 402; 37 Am. Rep. 779; *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429; *Gulf etc. R. R. Co. v. Eddins*, 60 Tex. 656; *Gulf etc. Ry. Co. v. Fuller*, 63 Tex. 467.

Whether the grading of the street in front of a lot will increase or diminish the value of the lot will depend upon the relative condition of the street and lot before and after the grading, and must be determined from the circumstances of each case. The elements which enter into this consideration are varied, and no rule can be prescribed which will be applicable to all cases. It is not every change of grade that will constitute a damage to the adjacent property. An excavation of one or two feet might not appreciably impair the value of the lot, while one of twenty feet would naturally have that effect; and the increased facility for communication with other parts of the city, or the opening up of the land to access by the public, may fully equal, if not exceed, the cost of grading the lot to correspond with the changed grade of the street. The mere fact that the property is worth as much after the grading as before is not an absolute test, since this may be the result of a general advance in values

throughout the entire vicinity, irrespective of the grading, or dependent upon some municipal improvement, of which the grading in front of the lot is only a part: *Pittsburgh etc. Ry. Co. v. McCloskey*, 110 Pa. St. 442. Nor is its diminution in value for some particular use necessarily a damage to the property. The grading of a street may impair the desirability or salability of a lot for use as a residence, while at the same time it may render it so desirable as a site for a warehouse or a manufactory as to increase its market value. The market value of a lot is not determined by its value for any particular use, but results from a consideration of all the uses for which it is adapted, and to which it may be ⁶²⁰ applied: *San Diego Land etc. Co. v. Neale*, 88 Cal. 50; and it is only when the market value of property is diminished by the public use that the property can be said to have sustained such damage as will entitle its owner to receive compensation.

The same rule is applicable when a street is for the first time reduced to an established grade, as when a change in the grade has been made after the street has once been brought to such grade. The suggestion that when the owner dedicates his land for a street it is with the understanding and consent on his part, binding also upon his grantees, that it will be subsequently fitted for use by grading, applies with as much force to any subsequent change in the established grade as to the first establishment of a grade. The power of the city to determine the grade is not exhausted with its first exercise, and the dedication by the owner must be deemed to have been made with a knowledge of this principle as much as with a consent to the establishment of any grade. The purchaser of a city lot fronting upon a street takes it subject to a right in the public to make the street available for the enjoyment of the easement therein for which the street was originally dedicated; but we are not aware that it has ever been held, where the foregoing constitutional provision prevailed, that the public had a right to establish any grade it might choose, irrespective of the damage such owner might sustain. This right to establish a grade in the street is attended with the corresponding obligation imposed by the constitution, to make compensation for any damage to the private property which may be caused by the public in its exercise of the right. It may be conceded that the dedication of a street carries with it the right to make such a reasonable grade as will adapt it for use, for in such a case the

grading of the street would have the effect to increase, rather than to diminish, the value of the lots adjacent thereto by making them accessible to the public; but if the municipality deems it desirable to establish a grade which will result in a damage rather ⁶²¹ than a benefit to the lots, the owner is entitled to compensation for the amount of this damage. The establishment of the grade is for the benefit of the public rather than of the adjacent owner, and if, in establishing such grade, the owner suffers damage, his property has been damaged "for public use." In *City of Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412, the street fronting the plaintiff's property was graded for the first time to a line about six feet below the ground on which his house stood, and the court held that the city was liable for any damage sustained thereby, saying: "It is urged that a municipal corporation is not liable for damages growing out of grading their streets. That was no doubt true before the adoption of our present constitution. Article 2, section 13, declares that private property shall not be taken or damaged for public use without just compensation. Now, this was private property, and the improvement was being made for public use; and, if the property was damaged thereby, appellee is entitled to just compensation for such damage; if injury was sustained, it was for public use." And in *Bloomington v. Pollock*, 141 Ill. 351, the same court said: "We are unable to see any sound legal ground for a distinction between cases where the damage is done under an ordinance which changes the grade of a street, and cases where the damage is done under an ordinance which for the first time establishes the grade": See, also, *Borough of New Brighton v. United Presbyterian Church*, 96 Pa. St. 331; *Hendricks' Appeal*, 103 Pa. St. 358; *Jones v. Borough of Bangor*, 144 Pa. St. 638; *Davis v. Missouri Pac. Ry. Co.*, 119 Mo. 180; 41 Am. St. Rep. 648; *Hickman v. City of Kansas*, 120 Mo. 110; 41 Am. St. Rep. 684.

The damage sustained by the plaintiffs was caused by the actual grading of the street, and not by the ordinance fixing the grade: *Jones v. Borough of Bangor*, 144 Pa. St. 638; *O'Brien v. Philadelphia*, 150 Pa. St. 589; 30 Am. St. Rep. 832. Until the physical condition of the street was changed their lot had received no actual damage for public use. The enactment of the ordinance ⁶²² rendered it possible that the street would at some time be reduced to that grade, but a mere paper change of grade did not affect the condition of

the lot or impair its use or enjoyment. Any diminution in value that it might sustain from the mere passing of the ordinance was purely speculative and contingent upon the time when grading should be done, and would no more constitute the damage contemplated by the constitution than would a diminution in its value resulting from excessive taxation or the creating of a municipal debt. Hence, the court did not err in refusing to permit testimony as to the damage caused by the adoption of the ordinance. Nor was the benefit that might be derived from the construction or operation of the defendant's railroad material to the issue. The use to which the street might be put by the defendant after the excavation had been made did not affect the damage caused to the lot by the excavation.

The plaintiffs were entitled to recover in this action the entire damage which their lot had sustained by the act of the defendant in making the excavation in the street: *Lake Erie etc. R. R. Co. v. Scott*, 132 Ill. 429; *City of Denver v. Bayer*, 7 Col. 113. The action was not for any personal damage that the plaintiffs had sustained, prior to the action, by reason of the interruption that they had sustained in their access to the lot, nor for damages resulting from an unlawful or unauthorized use of the street by the defendant, but it was for the damages which had been done to the lot itself by the permanent change in the street. These damages do not depend upon any subsequent use of the lot, but were complete when the grade was changed, and could be recovered in this action.

For the purpose of ascertaining the amount of damage that the plaintiffs had sustained witnesses were asked, "What effect did the cut have upon the value of the property?" and, upon replying that its effect was to depreciate the value, they were then asked, "To what extent?" and in reply stated the amount. These questions ⁶²³ were objected to by the defendant upon the ground that they were incompetent, irrelevant, and immaterial, and it is now urged that the opinions of the witnesses should have been limited to the market value of the property before and after the grading was done, and that the jury should have drawn its conclusion of the amount of damage from such evidence rather than from the opinions of the witnesses. If this special objection had been made at the trial the plaintiffs could have asked the questions in such a form as to obviate the

objection; but it is well settled that, unless the evidence is inadmissible for any purpose, a party is not at liberty under this general objection afterwards to urge a special objection, which goes merely to the form of the question by which the evidence is sought: *Crocker v. Carpenter*, 98 Cal. 418. The extent to which the property was damaged by the grading was the precise issue in controversy, and evidence tending to establish the amount of that damage was neither incompetent, nor irrelevant, nor immaterial. The inquiry of the witnesses respecting the value of the property would of itself, in the absence of any qualifying term, imply the "market value," and it was open for the defendant upon cross-examination to show that their opinion referred to some associate value. The subsequent question respecting the "extent" to which its value had been depreciated was but another mode of inquiring what was its market value after the grading, and the defendant had the same opportunity of testing by cross-examination the weight and accuracy of the replies to this question, or to show by other testimony that the value of the property had been increased by the grading, or that its depreciation was attributable to other causes than the grading.

The judgment and order are affirmed.

GAROUTTE, J., FITZGERALD, J., and DE HAVEN, J., concurred.

McFARLAND, J., dissented.

624 BEATTY, C. J., dissenting. I dissent. When the tract of land embracing these lots was by the owners laid off into streets and squares, the plat recorded and the lots sold by reference to such recorded plat, the streets were thereby dedicated to the public, and this dedication carried with it an implied consent, binding upon the owner and its successors, that the streets might be properly graded to fit them for the purpose for which they were dedicated. Such consent was a waiver of any claim for damages to abutting lots by reason of a proper grade. Here the city has established a grade, which, so far as appears, is, with reference to the whole tract, entirely reasonable and proper, although it is an injury to these particular lots, and the defendant, in laying its track, has been required to conform to the grade so established. The owners, in my opinion, have no claim for damages for bringing the street to the established grade.

Corcoran v. Benicia, 96 Cal. 1, 31 Am. St. Rep. 171, seems to me to be in direct conflict with the decision here.

Rehearing denied.

STREETS—DAMAGES TO ADJOINING LOT-OWNERS FROM ESTABLISHING OR CHANGING GRADE OF.—This question will be found thoroughly discussed in *O'Brien v. Philadelphia*, 150 Pa. St. 589; 30 Am. St. Rep. 832, and monographic note; and the note to *Columbus Gas etc. Co. v. Columbus*, 40 Am. St. Rep. 653. See, also, the recent cases of *Hickman v. City of Kansas*, 120 Mo. 110; 41 Am. St. Rep. 684 and note, and *Davis v. Missouri Pac. Ry. Co.*, 119 Mo. 180; 41 Am. St. Rep. 648, and note.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

**YALE GAS STOVE COMPANY v. WILCOX. WILCOX
v. FOLEY.**

[64 CONNECTICUT, 101.]

JOINT STOCK COMPANY—ACTION BY PROMOTER—CONTRACT AGAINST PUBLIC POLICY.—Where the owner of property is willing to take a certain price for it, a secret contract between such owner and one who undertakes to, and does, organize a joint stock company for its purchase at a much larger sum, wherein it is agreed that the avails of such transaction shall be divided between such owner and “promoter,” and which sale and purchase are effected by the aid and influence of said parties as stockholders and directors in said company, is void as against public policy; and no action can be maintained by the “promoter” against the owner to recover the value of the former’s alleged share of such avails.

VENDOR AND PURCHASER—SECRET CONTRACT—ACCOUNTING.—Where two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that particular property can be bought for a designated price, which he procures to be paid by his associates, when in fact he receives a difference between said sum and a less one, he may be compelled to account for such difference without any rescission of the contract, and although the property may be worth all or more than was paid for it. This principle applies against promoters of corporations in case of any secret contract more favorable than that disclosed.

JOINT STOCK COMPANY—PROMOTER—SECRET CONTRACT—FRAUD—ACTION BY COMPANY FOR SECRET PROFITS.—Where the owner of property is willing to take a stated price for it, but enters into a secret contract with the “promoter” of a joint stock company for its purchase at a much larger sum, wherein it is agreed that the avails of the transaction shall be divided between them, and the transaction is consummated by the aid and influence of said parties as stockholders and directors in said corporation, the company may, upon discovering the fraud practiced upon it, sue and recover of such parties the secret profits obtained by them in the transaction, though no offer of rescission be made by the

company, and though the property purchased is worth as much or more than was paid for it.

MAXIM.—The maxim that "he who comes into equity must come with clean hands," applies solely to willful misconduct in regard to the matter in litigation, and not to some other illegal transaction, although it may be indirectly connected with the subject matter of the suit.

CORPORATIONS—PROMOTERS OF, DEFINED.—A "promoter" is a person who organizes a corporation. The word is not a legal, but a business, term, and includes a number of business operations, familiar to the commercial world, by which a company is generally brought into existence. Such a person occupies a fiduciary relation toward the company or corporation whose organization he seeks to promote, and is sometimes called a "trustee."

CORPORATIONS—PROMOTERS OF, MAY DEAL WITH—RESTRICTIONS—FRAUD. The "promoter" of a corporation may lawfully deal with his company but such a transaction must, in all its parts, be open and fair. Suppression, concealment, or misrepresentation of material facts is fraud, which, if proved, will justify a rescission of the contract, or compulsory repayment of secret profits. A "promoter" cannot act both as vendor and purchaser, and in the latter capacity approve a transaction suggested by him in the former.

THE first case above named was an action to recover damages and also for equitable relief, for fraud alleged to have been practiced upon the plaintiff by the defendant Wilcox, in the sale of certain letters patent. The second case was an action to recover damages for the breach of a contract relating to the sale of the aforesaid letters patent. Foley owned the patents, and had offered in a conversation with Wilcox to sell them for two thousand five hundred dollars. Wilcox believed the patents to be valuable, and proposed to Foley the organization by said Wilcox of a joint stock company for manufacturing gas stoves under said patents, the sale of said patents to said company, and a division between Foley and Wilcox of the avails of such sale. Wilcox and Foley entered into a contract in accordance with this proposition, wherein it was agreed that Foley should receive for his patents, upon the organization of the company, the sum of three thousand dollars in cash, and five thousand dollars of the capital stock of the company; and that as soon as received Foley should give to Wilcox one-half of the three thousand dollars cash, and one-half of the five thousand dollars of said capital stock. The company was organized, the patents sold to it for the price stated, and Wilcox and Foley became directors of the company. The value of the stock was fifty dollars per share, and on or before December 1, 1890, Wilcox received from Foley fifty of the one hundred shares issued to Foley as a

part of the purchase price of said patents. On April 30, 1890, Foley paid Wilcox three hundred dollars on "account of contract," and on October 9, 1890, he paid him five hundred dollars, "on account," but declined to make any further payments. The contract between Foley and Wilcox was kept secret, and the corporation had done no act in rescission of its purchase.

John W. Alling, for the Yale Gas Stove Company and John B. Foley.

William L. Bennett, for Jedediah Wilcox.

¹¹⁵ FENN, J. Upon the facts appearing upon the record, it is claimed in behalf of Jedediah Wilcox, the defendant in the principal case, that the agreement between Foley and himself was a valid and proper contract which could be carried out without fraud, and contemplated none; that therefore, when he began to solicit subscriptions to the stock of the new corporation, he had an interest in the patents; that he was in fact a partner with Foley, that in making this contract with Foley he acted wholly for himself, and stood in no fiduciary relation to the Yale Gas Stove Company, or any of its stockholders. "There was," says his counsel, "no man, and no body of men, who had any hold upon him at the time he made this contract; nor any to whom he owed a duty, nor any selected, and in contemplation, to whom he might owe a duty." The objections "that a resale to some new corporation was contemplated, that the purchase price was to be new stock of such corporation, that but little time elapsed between the two contracts," are said to be "all met and answered" by the cases of *Ladywell Min. Co. v. Brookes*, L. R. 34 Ch. Div. 398; and on appeal, L. R. 35 Ch. Div. 400; *Gover's case*, L. R. 20 Eq. Cas. 114; *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73; and *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218.

It is further said that these cases, and also the case of *Barr v. New York etc. R. R. Co.*, 125 N. Y. 263, 277, and *In re Cape Breton Co.*, L. R. 29 Ch. Div. 795, are authorities for the defendant's further claim, that: "If it be assumed that Mr. Wilcox, as director, or while holding a fiduciary relation to the corporation, sold the patents to it without disclosing his interest therein, such sale is yet not void, but is voidable only," and that "but two courses are open to the company, to wit: they could affirm the sale, or rescind it, return the

patents and sue for the price. They ¹¹⁶ cannot, as they are here attempting, keep the patents and recover the consideration received by Wilcox from Foley."

In the light of the above claims we will first examine the cases cited in their support, and see precisely what they hold. The principal and most recent of these English cases is that of *Ladywell Min. Co. v. Brookes*, L. R. 34 Ch. Div. 389, in which the facts were, that on February 1, 1873, one Palin and three associates purchased a leasehold mine for five thousand pounds, with a view of reselling it at a profit to a company to be formed. They afterwards made a provisional contract with a trustee for an intended company for eighteen thousand pounds in cash. The company was formed having for its principal object the purchase of the mine, and Palin and his associates received their purchase money of eighteen thousand pounds, April 4, 1873. The contract of February 1, 1873, was not disclosed to the company, nor did it become known to it until about June, 1883, after it had gone into voluntary liquidation. In June, 1883, the company allowed judgment by default to go against them, in an action by the lessor to recover possession of the mine. In 1884 the company commenced two actions, one against the executors of two deceased vendors, and the other against the two surviving vendors, to recover the secret profits made by the vendors on their sale to the company, on the ground that they stood in a fiduciary capacity to the company at the time they bought the mine. It was held that the evidence failed to show this to be the fact, and that they were not liable to refund the profit they made on the transaction. The judgment of Justice Stirling, *Ladywell Mining Co. v. Brookes*, L. R. 34 Ch Div. 389, was appealed from, and this appeal constitutes the case in L. R. 35 Ch. Div. 400, in which the former judgment was sustained. There are several opinions. In that by Cotton, L. J., it is said that the plaintiff claims that the defendants stood in such a position at the time of their purchase that they could not have claimed to have bought the mine for themselves, and could not, therefore, sell it at an advanced price to the company. This is said to be mainly a question of fact; and on that question the contract of February 1, 1873, was in its terms perfectly absolute, and not dependent on any company being formed; that though ¹¹⁷ doubtless it was contemplated a company should be formed, no part of the purchase money was to be provided for out of the funds of

the company, or to consist of shares of the company; and it is added: "One thing which is very strong in favor of the defendants is that the whole of the price, five thousand pounds, was, in fact, completely paid when the lease was granted out of their own money, and not in any way out of money provided by means of this company"; and finally, it is said that the facts found did not make the defendants, at the time when they entered into the contract to purchase, persons so acting as to entitle the company afterwards to say: "When you bought this mine, you were acting for us; this purchase, although made by you, is one which must be considered as having been made by you for the company which was afterwards formed at your invitation." Lindley, L. J., concurring, said there might be a case for rescission, if rescission were possible; but that rescission was not possible, because the property assigned by the company did not belong to it any longer. He added: "Then we are driven to consider the point which was really raised and decided in *In re Cape Breton Co.*, L. R. 29 Ch. Div. 795, whether rescission being impossible the company can obtain from Palin an account of the profit which he made by the transactions which have been alluded to, and that depends really upon the evidence. But the evidence is not sufficient to enable them to succeed. It is not proved that when Palin bought—that is, on the 1st of February, 1873,—he bought for the company which was ultimately formed; nor that, when he bought, the company was so far formed as to entitle it or its members to claim the benefit of the purchase on any theory of trusteeship; nor is it proved that persons were induced to take shares on the faith that the new company was buying from the old company. It is plain that the new company did not, in fact, find the money with which the vendors were paid. Under those circumstances, can we say that there was any such relation between Palin and the company as to entitle the company to say, You bought for us? It appears to me that the evidence is not sufficient for that purpose. If it were we could see our way to give relief." ¹¹⁸ Loopes, L. J., also concurring, said: "The question is, Did Palin and his associates, on the 1st of February, stand in a fiduciary position towards this company that was thereafter to be formed; or, in other words, were they then acting for the company about to be formed? If they were, the plaintiffs are entitled to succeed." This, he said, was entirely a question of evidence, and that in his view the

evidence did not establish this conclusion. "They bought the mine themselves and paid for it out of their own pockets. No person is called to say they were asked to take shares, by any of these vendors, because they were forming a company." He concludes: "No doubt, having regard to the secret profit that was made by these vendors the company might have claimed rescission of the contract, but, in the circumstances, rescission had become impossible."

The other cases may be more briefly stated. In *Gover's case*, L. R. 20 Eq. Cas. 114, one Mappin agreed to buy a patent from Skoines for sixty-five thousand pounds, payable partly in cash, and partly in shares of a company to be formed to use the invention. Mappin also engaged to use his best efforts to organize the company. Three months later Mappin agreed with one Wright, who acted as trustee for the proposed company, to sell the patent to it for one hundred and twenty-five thousand pounds payable in cash and shares, and it was also agreed that Mappin should be appointed managing director. The company was formed, and Mappin became a director. The suit was an application by Miss Gover, a subscriber pressed to pay "calls," to have her name removed from the company's register of members, because of the failure to disclose the Mappin-Skoines contract in the prospectus. It was decided that the statute did not give a remedy against the company, but only against a delinquent promoter, and it held that Mappin was not a promoter when he made the contract.

In *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218, a leasehold interest in the island of Sombrero was purchased by a syndicate acting for themselves alone, and not as the representatives of any corporation existing or proposed. Soon afterwards they formed a joint stock company, and sold the lease to it for double the price paid by them. The contract¹¹⁹ of purchase by the corporation, at its instance, was set aside. In *In re Cape Breton Co.*, L. R. 29 Ch. Div. 795, the facts, briefly, were: One Fenn was the agent of a company to purchase a specific property, in which, before the commencement of his agency, he had acquired an interest. He did purchase it for the company without disclosing to the company his interest in the property. After his purchase the facts were fully disclosed, and with the knowledge so acquired the company elected to retain the property. It was held the company could not recover. But the court said:

“This case is not the case of an agent who, after he has accepted the agency, has acquired property, the purchase of which was within the scope of his agency, and then has resold that property to his principal at a larger sum, in which case it is obvious that the principal may say that the original purchase by the agent at a small price was a purchase in behalf of the principal.”

In *Barr v. New York etc. R. R. Co.*, 125 N. Y. 263, 277, it is sufficient to say that the principle is laid down that a voidable contract remains good until rescinded, and that to rescind, the property obtained under the contract must be returned.

Who and what are promoters, so called, of corporations, and what their relations to the corporations which they help to form, has been more frequently judicially considered and determined by the English courts than by those of this country. Some English cases appear to be more in point, as applicable to the questions arising upon the record than those cited by the defendant, to which we have just referred. A promoter has been defined to be a person who organizes a corporation. It is said to be not a legal, but a business, term, “usefully summing up, in a single word, a number of business operations, familiar to the commercial world, by which a company is generally brought into existence”: Bowen, J., in *Whaley Bridge Calico Printing Co. v. Green*, 28 Week. Rep. 351, 352. That such persons occupy a fiduciary relation toward the company or corporation whose organization they seek to promote is well settled by the decisions of both countries. Lord Cotton prefers to ¹²⁰ call them “trustees”: *Bagnall v. Carlton*, 6 Ch. Div. 385. Sir George Jessel, M. R., in *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73, said: “Promoters stand in a fiduciary relation to that company which is their creature.” In *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218, the Lord Chancellor said of promoters: “They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and molding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchasers of the property of themselves, the promoters, it is, in my opinion, incumbent

upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sell it to the company through the medium of a board of directors who can, and do, exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person." Lord O'Hagan, referring to the same subject, expressed a similar opinion in even more emphatic language, declaring that while an original purchase might be legitimate, and not less so, because the object of the purchaser was to sell it again, and to sell it by forming a company which might afford them a profit on the transaction, yet: "The privilege given them for promoting such a company for such an object involved obligations of a very serious kind. It required, in its exercise, the utmost good faith, the completest truthfulness, and a careful regard to the protection of the future stockholders."

¹²¹ The test, therefore, of the validity of such transactions is that it must, in all its parts, be open and fair, so that the promoters shall not in fact substantially "act both as vendors and vendees, and in the latter capacity approve a transaction suggested by them in the former": *Foss v. Harbottle*, 2 Hare, 461, 488; *McElhenny's Appeal*, 61 Pa. St. 188; *Simons v. Vulcan Oil & Mining Co.*, 61 Pa. St. 202; 100 Am. Dec. 628; *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43; *Pittsburgh Mining Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149; *South Joplin Land Co. v. Case*, 104 Mo. 572; *In re British Seamless Paper Box Co.*, L. R. 17 Ch. Div. 467; *Phosphate Sewage Co. v. Hartmont*, L. R. 5 Ch. Div. 394. In the last case, the distinctive feature was that the vendors paid the commission to the trustees who received the property on behalf of the company. They were compelled to pay it to the company. In *Hichens v. Congreve*, 1 Russ. & M. 150 (on appeal, 4 Russ. 562), three promoters induced their company to buy a mine for twenty-five thousand pounds, of which they received from the vendor and divided among

themselves fifteen thousand pounds. This they were compelled to account for to the company. Similar cases are *Beck v. Kantorowicz*, 3 Kay & J. 230; *Whaley Bridge Calico Printing Co. v. Green*, 28 Week. Rep. 351, 352; *Emma Silver Mining Co. v. Grant*, 11 Ch. Div. 918; *Bagnall v. Carlton*, 6 Ch. Div. 385; *Kent v. Freehold Land & Brick-making Co. (Limited)*, 17 L. T., N. S., 77; *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610.

It is an undoubted rule of law that where two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that particular property can be bought for a designated price, which he procures to be paid by his associates, when in fact he receives a difference between said sum and a less one, he may be compelled to account for such difference without any rescission of the contract, and although the property may be worth all or more than was paid for it: *Emery v. Parrott*, 107 Mass. 95. The same principle is applied against promoters of corporations, in case of any secret contract more favorable than that disclosed: *Pittsburgh Min. Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149; and ¹²² the very numerous cases therein cited; and an exhaustive note by Mr. Freeman to said case, 17 Am. St. Rep. 167. See, also, as applied to directors, *Cook on Stocks and Stockholders*, secs. 649, 650; *Gilman etc. R. R. Co. v. Kelly*, 77 Ill. 426; *Wardell v. Railroad Co.*, 103 U. S. 651; *McGourkey v. Toledo etc. Ry. Co.*, 146 U. S. 536.

A careful examination of the cases will, we think, disclose two grounds of the liability of defendants to corporations for undisclosed profits resulting from transactions with such corporations: first, where the defendants are corporate fiduciaries. The characteristic of this relation is trust. Such a relation undoubtedly exists between companies and their officers, such as directors: *Mallory v. Mallory Wheeler Co.*, 61 Conn. 135. With reference to promoters, since a man cannot receive an appointment from a nonexistent company, the proof may be less obvious; but it may nevertheless be shown conclusively by a variety of representations, admissions, and acts. The second ground of liability is fraud. The law does not prohibit a promoter from dealing with his company. But he must make full disclosure to the company of his relations to the property that is the subject of his deal. Suppression, concealment, or misrepresentation of material

facts, is fraud; upon proof of which rescission of contract or repayment of the secret profits will be compelled.

A very recent English case, in which a secret arrangement between a promoter and a director of a company was considered, is that of *In re North Australian Territory Co. (Archer's case)*, L. R. 1 Ch. Div. 322. The facts in the case were these: Archer being requested by the promoter of a projected company to become a director, agreed to do so upon the terms that if he should at any time desire to part with the shares he was to take in order to qualify him as director, the promoter should purchase them of him at the price he should pay for them. The company was subsequently formed, and Archer became a director, took the qualification shares, and paid for them at par out of his own money, and from time to time acted as director; but he never¹²³ disclosed to his codirectors or to the company his agreement with the promoter. He afterwards resigned his office of director, and, subsequently to his resignation, the promoter, at his request, paid to him the sum which he had paid for the shares, and accepted a transfer of them. At that time the shares were valueless in the market. In the winding up of the company the liquidators asked that Archer be ordered to pay to them the sum received by him from the promoter, with interest; and it was held, reversing the lower court, that, having regard to his position, as director of, and therefore agent for the company, whatever benefit or profit accrued to him under the indemnity constituted by his secret agreements with the promoter, belonged to the company; and that the retention by him of the proceeds of the indemnity occasioned a loss to the company, for which he was accountable, with interest, upon what was declared to be the principle of *Hay's case*, L. R. 10 Ch. 593, and *Pearson's case*, 5 Ch. Div. 336. During the argument the counsel for the liquidators, in support of the appeal, were stopped by the court, and counsel for Archer then proceeding, were submitted to some peculiar interruptions by the judges. Fry, L. J., asked: "Why should not Archer be accountable for the five hundred pounds, as 'property' of the company retained by him"? Counsel replied: "The real question is, Did the company suffer loss by what was done? They never had the five hundred pounds, and therefore cannot be said to have lost it. In the majority of cases in which a director has been held accountable to the company he has, in effect, received money

which originally came from the coffers of the company, as in Hay's case, and the cases already mentioned." Bowen, L. J.: "Smith, being in a fiduciary relation to the company, had no right to give a director a benefit without the company knowing it. An indemnity against loss is a valuable consideration." Counsel said: "At the time the letter was written Archer had not taken the shares, and had not then agreed to become a director. Again, there is no evidence that the contract was not disclosed to the company." Fry, L. J., asked: "Would an honorable man assent, as Archer did, to accepting this indemnity, on the ¹²⁴ terms that he was to keep it secret? If it was not actually dishonest, it seems to me to be a very improper course of proceeding." Bowen, L. J.: "Is it right that the wolf should give a sop to the watchdog, without his master's leave"? This question appears to have practically "closed the debate." The opinions of the judges, separately declared, appear at considerable length in the report, and are so able and apposite that we regret that we cannot feel warranted in quoting from them.

Applying the principles recognized in the decisions to which we have referred to the case before us it seems clear that the plaintiff in the principal case is entitled to recover. The finding is explicit that the original arrangement between Wilcox and Foley contemplated no acquisition of any interest in the patents by Wilcox, but the organization by Wilcox of a corporation, and the sale to it of such patents; then a division between Foley and Wilcox of the avails of such sales. The written contract between Wilcox and Foley was entered into for the purpose of carrying out said plan of organizing the company, selling the patent, and dividing the avails. In the agreement itself, while it is stated, under a "whereas," that Wilcox is desirous of owning one-half of said patents, yet the very writing discloses that the proper construction of this language is that the patents, as belonging to Foley, should be sold to a joint stock corporation to be organized by Wilcox for twice the sum that Foley was willing to dispose of them for, namely, for the sum of three thousand dollars in cash to be received from the company, and five thousand dollars of the capital stock of the company, and that then Foley should give to "said Wilcox one-half of the three thousand dollars cash, as soon as received, and one-half of the five thousand dollars of the capital stock of the company, as he shall receive it."

Such being the arrangement, it was, very appropriately, agreed that it should be kept secret. Wilcox, in soliciting subscriptions for stock, most scrupulously observed such obligation of secrecy, and also went further, and "for the purpose of inducing persons to subscribe for said stock, stated to ¹²⁵ nearly all of the persons who subscribed for said stock, and who now constitute the stockholders of said company, that he, Wilcox, was putting his money into said enterprise upon precisely the same basis as the other of said subscribers. And it was with that understanding that nearly all of said persons subscribed for said stock." The corporation was organized, and Wilcox, at its first meeting, was present, and was elected temporary clerk and a director, and voted in favor of a resolution which was adopted, which recited that Foley was the owner of certain letters patent, necessary and convenient for the purposes of the company, and which directed their purchase for certain stock and the sum of three thousand dollars in cash.

It will thus be seen that the transaction between Wilcox and Foley contemplated, and Wilcox, in its execution, both as promoter and director, used every possible species of bad faith, breach of trust, and infidelity, while occupying such a fiduciary relation. Placing the actual conduct of Wilcox side by side with the standard of conduct required of those in such positions, as declared by the judges in the *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73, so much relied upon as authority by the defendant, the contrast is overpowering.

Although many of the very numerous cases which we have cited, and almost numberless others to which reference might also be made, are direct authorities for the doctrine that in such cases as that before us a defendant may be compelled to account, though no offer of rescission is made, and the property may be worth as much or more than was paid for it, and although the subject has already been incidentally referred to and considered in certain aspects of it, in this opinion, yet, in view of certain language in some of the cases upon which the defendant relies, including *Mallory v. Mallory Wheeler Co.*, 61 Conn. 135, and *Tryon v. White etc. Co.*, 62 Conn. 171, it may be useful further to say that, properly understood, there is nothing in any of such cases cited by the defendant in conflict with the doctrine stated. Thus, in *Mallory v. Mallory Wheeler Co.*, 61 Conn. 135, the plaintiff sought to recover

a sum as balance of salary claimed to be due him ¹²⁶ for services rendered as chief manager and director of the defendant's business. It was claimed that the contract under which such service was performed was void, or, if not void, that it was voidable at the option of the corporation. This court, treating it as a case in which a director had made use of a fiduciary relation to secure for himself an advantageous contract for a salary, held that, independent of the question of public policy, such transaction was voidable at the election of the corporation. The court then added: "It may fairly be gathered, from the authorities cited, that the rule we are now considering does not operate *ipso viro* to avoid every transaction of a trustee made with his beneficiary in which he is interested. It is generally limited in its operation to rendering it voidable at the election of the party whose interests are concerned in the question of its affirmance or disaffirmance. If, therefore, nothing was done in avoidance, the transaction remains: 2 Pomeroy's Equity Jurisprudence, sec. 1077; *Duncomb v. New York etc. R. R. Co.*, 84 N. Y. 190, 198. Much more if the transaction has been ratified by that party: *Barr v. New York etc. R. R. Co.*, 125 N. Y. 263." This court, in that case, was considering a transaction in which there was no concealment or secret profit, and nothing proved to have been done, in actual, as distinguished from constructive, bad faith or fraud, and the plain distinction between such a case and the one under consideration in reference to equitable relief, is clearly shown in the section referred to in 2 Pomeroy's Equity Jurisprudence, section 1077, and the very numerous authorities cited in the exhaustive note to that section, in the second edition. The same thing may be said in reference to other cases relied upon by the defendant; and we think the contention that a person who, first as a promotor, then as a director, induces a corporation to embark its capital in a business in such a way that the rescission of its purchase of property, essential to the continued life of the company, can only be made by the sacrifice of such existence, can retain his secret profits in the transaction, unless the contract shall be rescinded and the enterprise abandoned, is contrary to the doctrine of numerous ¹²⁷ cases, and without the intended sanction of any. Such a rule would permit retention of secret profits, and its enforcement would turn the courts into promoters, not of corporations, but of frauds upon them, numerous enough as they are, and needing no such promotion. "It is a general rule

that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract and demand back what has been received under it, or he may affirm the bargain, and sue and recover damages for the fraud": Cooley on Torts, 589, 591, and cases cited in note 2. Thus, if, after discovering a shortage in goods, the price is paid, an action lies for the fraud, although the contract may not be disaffirmed: *Nauman v. Oberle*, 90 Mo. 666. So, also, in case of wrong dealing by a trustee, the rule is, when the facts come to the knowledge of the *cestui que trust*, he may either affirm or repudiate the transaction, and if he does the former he may yet recover secret profits. Thus, where a partner sold his own goods to a partnership without the knowledge of his associates, he was held liable to account to them for the profits: *Bentley v. Craven*, 18 Beav. 75; see, also, *Kimber v. Barber*, L. R. 8 Ch. App. 56; *Getty v. Devlin*, 54 N. Y. 412.

The same rule applies in the law of principal and agent, and of attorney and client; indeed, in every case where one improperly conducts himself to his own advantage while acting in any fiduciary capacity. The language, therefore, cited from *Mallory v. Mallory Wheeler Co.*, 61 Conn. 135, and the statement in *Tryon v. White etc. Co.*, 62 Conn. 173, that "an acceptance of the benefits of the transaction imposes an obligation to assume its burdens," and the principles stated in other decisions relied upon by the defendant, have no legitimate application to cases where a corporation seeks to recover from a promoter or director money had and received, which in equity and good conscience belonged to the corporation. Instead of rescinding the transaction of purchase the corporation, by its suit, affirms it, and enforces the real contract as made for its benefit, and not the pretended contract, as simulated, in order to defraud it. In such a case the ¹²⁸ corporation recognizes the obligation to assume the burdens, and only demands that it shall receive "the benefits of the transaction." Indeed, the principle of *Murray v. Jennings*, 42 Conn. 9, 19 Am. Rep. 527, is decisive of this whole matter.

The defendant in the principal case further contends that the Yale Gas Stove Company does not appear in court with clean hands. It is said the finding shows that "the real bargain between Foley and the Yale Gas Stove Company fixed the price to be paid for his patents at three thousand dollars in cash and five thousand dollars in stock"; but that to

avoid the joint stock law, and to defraud the public, a sham contract was made; that thereafter a court of equity should leave them where they have placed themselves. "With what propriety," it is asked; "can the court decree that one party shall give up to the other an illegal profit, while permitting that other to keep an equally illegal profit obtained in the same transaction."

The maxim that "he who comes into equity must come with clean hands" has no such application as the defendant seeks to give it. It refers solely to willful misconduct in regard to the matter in litigation: Snell's Equity, 35. Though an obligation be indirectly connected with an illegal transaction, it will not thereby be barred from enforcement if the plaintiff does not require the aid of the illegal transaction to make out his case: *Armstrong v. American Exchange Bank*, 133 U. S. 433; *Lewis' Appeal*, 67 Pa. St. 153, 166; *Woodward v. Woodward*, 41 N. J. Eq. 224; *Pittsburg Mining Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149.

Finally, the suit was properly brought by the corporation, instead of by its stockholders. The question arose in *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. Div. 122, and James, L. J., said: "The company represent the contracts of yesterday as of to-day, as they will the contracts of to-morrow or the next day, or next year. They represent the contracts which were made by the company; they are liable upon the contracts, and they have every right in respect of those contracts which an individual being would have if he had the like case, or was under the like liability. Therefore I am of the opinion that the company not only can sue, but ¹²⁹ that the company was the only proper plaintiff that could sue upon the case made by this bill": See, also, 1 Morawetz on Corporations, sec. 546; 3 Pomeroy's Equity Jurisprudence, secs. 1094, 1096, and the numerous cases therein cited. Indeed, no contention upon this point was made.

In reference to the suit of *Wilcox v. Foley*, the contract between them was manifestly opposed to public policy, to good morals; it is illegal, and cannot be enforced. If any one has a cause of action against Foley, not upon the contract, but by reason of the transaction to which it led, it is the corporation, and not Wilcox.

The superior court is advised that judgment be rendered for the plaintiff in *Yale Gas Stove Co. v. Wilcox*, to recover three thousand dollars, with interest on five hundred dollars

of said sum, from October 9, 1890, to the date of said judgment, and interest on the balance of two thousand five hundred dollars, from December 1, 1890, with costs. And in the case of *Wilcox v. Foley*, that judgment be rendered for the defendant.

In this opinion the other judges concurred.

CORPORATIONS—SALES OF PROPERTY TO BY PROMOTERS—SECRET PROFITS.—If promoters of a corporation have obtained an option for the purchase of property at a certain price, and have proceeded to form a corporation, representing to persons whom they induced to subscribe for its stock that such option would cost a larger price than they have agreed to pay, and if, after procuring such subscription, they purchase the property at the smaller price, and charge the corporation the higher, it may sustain an action against them, and recover the difference between the two prices: *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307; 17 Am. St. Rep. 149, and extended note at pages 165-167.

CORPORATIONS—PROMOTERS.—DEALINGS BETWEEN MUST BE FAIR AND OPEN: See *Bosher v. Richmond etc. Land Co.*, 89 Va. 455; 37 Am. St. Rep. 879, and note, and *Brewster v. Hatch*, 122 N. Y. 349; 19 Am. St. Rep. 498.

CORPORATIONS—PROMOTERS DEFINED.—A promoter is one who brings about the incorporation and organization of a corporation: *Bosher v. Richmond etc. Land Co.*, 89 Va. 455; 37 Am. St. Rep. 879.

BROKERS—SECRET PROFITS.—Where an agent, with authority in writing to sell land for a certain price, agrees with a third person to sell it to him for a greatly enhanced price, but concealing this fact from his principal, obtains the latter's title for the price for which he agreed to sell for him, and then sells to the third party for the price agreed upon between them, he is liable to his principal for the difference in price between the amount paid him for his title and the amount for which the sale was made: *Kramer v. Winslow*, 130 Pa. St. 484; 17 Am. St. Rep. 782.

MULLEN v. REED.

[64 CONNECTICUT, 240.]

INSURANCE—BENEFIT ASSOCIATION—LAW OF PLACE.—A contract of insurance in a benefit association should be construed and interpreted according to the laws of the state where the contract was made and was to be performed.

BENEFIT ASSOCIATION—CONTRACT OF INSURANCE IN, HOW CONSTRUED.—A contract of insurance in a benefit association as shown by its certificate of membership should be construed in accordance with what appears to have been the actual intent of the parties as gathered from the language of the certificate when read in the light of the circumstances under which it issued.

BENEFIT ASSOCIATION—CONSTRUCTION OF TERM, "HEIRS AT LAW."—The term "heirs at law" in the certificate of membership of a benefit association should not be construed in its strict, primary, and technical

sense where it is apparent from the language used that the parties intended it to have a more comprehensive and popular meaning..

TERM "HEIRS AT LAW" CONSTRUED — INCLUDES WIDOW. — Where personal property is disposed of by an instrument the term "heirs at law" means those persons who are entitled to take under the statute of distribution, unless there is something in the context to indicate a contrary intention. They take in the same manner and in the same proportions as if the property had come to them as intestate estate, unless a contrary intention appears. The term includes a widow.

BENEFIT ASSOCIATION — LAW OF PLACE — WIDOW'S RIGHT — "HEIRS AT LAW." — Where a husband is insured in a benefit association organized under the laws of Massachusetts, in which state the contract is made and is to be performed, and the association, in its certificate of membership, agrees "to pay to the heirs at law of said member" a sum of money in sixty days after proof of his death, and the husband dies domiciled in Connecticut leaving a widow and one child, a minor, and the association pays the amount due, five thousand dollars, to the guardian of such child, and the widow brings an action against the guardian to recover a portion of the money so paid, the contract should be construed according to the laws of Massachusetts; the widow is an "heir at law" within the meaning of that term as used in the certificate of membership, and she is entitled to one-third of the insurance money under the certificate, that being the share of the money that she would take under the laws of that state.

BENEFIT ASSOCIATION — BENEFICIARIES. — The money due upon the certificate of a member of a benefit association at the time of his death forms no part of his estate, but belongs to the beneficiaries.

STIPULATION — RECORD — APPEAL — QUESTIONS NOT REVIEWABLE, WHEN. — A written stipulation, signed by the counsel for both parties, that the appellee may raise and argue questions of law in the supreme court, and filed after the other party has taken an appeal, is no part of the record, although printed with it; and the appellate court will not consider such questions, particularly where it does not appear of record that they were raised in the trial court, and decided adversely to the appellee.

ACTION by the widow of Joseph Mullen, to recover a portion of the insurance money paid over by the association of which he was a member.

Joel H. Reed, for the appellant.

William A. King, for the appellee.

245 **TORRANCE, J.** In July, 1891, Joseph Mullen, domiciled in the town of Stafford, in this state, died intestate, leaving the plaintiff as his widow and one minor child. The plaintiff and the deceased intermarried prior to 1877, and said child is the issue of the marriage.

At the time of his death Joseph Mullen was a member of "The Bay State Beneficiary Association" of Westfield, Massachusetts, a corporation organized under the laws of that state.

"for the purpose of providing benefit and protection to its members and their families." He became a member thereof in 1882, while domiciled in the state of Massachusetts, where he and his family continued to reside for some years afterwards. By the certificate of membership issued ²⁴⁶ to him by said association he was constituted a member thereof; and in said certificate the association agreed "to pay to the 'heirs at law' of said member, in sixty days after due proof of the death of said member, a sum equal to the amount received from one death assessment, but not to exceed five thousand dollars."

Within sixty days after his death said association paid to the defendant Reed, as the guardian of said minor child, the sum of five thousand dollars in full of the amount due under said certificate, and he now holds the same as such guardian. The present action was brought by the plaintiff, the widow of Joseph Mullen, against said guardian to recover a portion of said insurance money.

The defendant Reed demurred to the complaint because it did not appear therein "that the plaintiff is an heir at law of the said Joseph Mullen, or that she is entitled to any part of said insurance money."

The court overruled the demurrer, and subsequently, after the administrator of Joseph Mullen had been cited in as a party, and, "after a full hearing," no answer having been filed in the case, rendered judgment that the widow recover of the defendant Reed one-third of the insurance money together with costs of suit.

From that judgment Reed, as guardian of the child, took the present appeal, alleging as reasons of appeal that the court erred in overruling the demurrer, and in deciding that the plaintiff was entitled to one-third of the money. It does not appear that the administrator makes any claim to the insurance money or any part thereof, or that he took any part in this suit. There is really but one question before us upon this appeal, and that is whether the widow is entitled to one-third of the insurance money.

By a written agreement signed by the counsel for both parties, filed in the court below after the present appeal was taken and printed with the record, the plaintiff attempts to bring up the question whether the widow is or is not entitled to one-half rather than one-third of the insurance money, if she is entitled to any; but this agreement is no part of the

247 record in any proper sense, and it nowhere appears upon the record, as required by the statute (sec. 1135) that this question was raised on the trial below and decided adversely to the plaintiff. That question is, therefore, not properly before us, and for this reason we decline to consider it.

The question, then, is whether the widow is entitled to one-third of the insurance money; and its solution depends upon the construction of the words "heirs at law" contained in the certificate of membership under which the money was paid over to the guardian of the minor child.

What do these words "heirs at law" mean in this certificate? Do they include or exclude the widow? Under these words the guardian claims the entire sum for the minor child, and the widow claims a share of it under the same words.

The question, of course, is, What was intended by these words at the time they were put into this certificate? and this is to be ascertained from the words used to express the intention, when read in the light of all the circumstances under which they were used. In ascertaining their meaning it must be borne in mind that the contract embodied in the certificate was made in Massachusetts, by parties domiciled or located there; that it was undoubtedly made with reference to the law of that state alone; and that both by its terms and by the understanding of the parties it was to be performed there. This being so, the general rule is that it should be construed and interpreted according to the laws of that state: *Smith v. Mead*, 3 Conn. 253; 8 Am. Dec. 183; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Koster v. Merritt*, 32 Conn. 246. "For purposes of construction, it is always legitimate to consider the time when, and the circumstances in which, the will was made, and we think the law under which it was made is one of those circumstances": *Staigg v. Atkinson*, 144 Mass. 564. This principle is, we think, equally applicable to an instrument like this certificate.

We therefore think the words "heirs at law" in this instrument ought to be construed by us as they would be by the courts of Massachusetts, if this certificate was before them for construction upon this point; and as we understand 248 the matter, the courts of that state, in cases where the words "heirs at law" are used in an instrument disposing of personal property alone, have quite uniformly construed

them as meaning those persons who are entitled to take under the statute of distributions, unless there is something in the context to indicate a contrary intention: *Houghton v. Kendall*, 7 Allen, 72; *Sweet v. Dutton*, 109 Mass. 589; 12 Am. Rep. 744; *White v. Stanfield*, 146 Mass. 424; *Kendall v. Gleason*, 152 Mass. 457. And not only this, but the courts of that state have held that the words "heirs at law," when used in such an instrument, indicated an intent that such persons are to take in the same manner and in the same proportions as if the property had come to them as intestate estate, unless a contrary intention appears. Thus, in *Houghton v. Kendall*, 7 Allen, 72, the court says:

"In this commonwealth we find no authority which would conflict with the adoption of the construction which seems to us reasonable, that when the word 'heirs' is used in the gift of personalty, it should primarily be held to refer to those who would be entitled to take under the statute of distributions, and to indicate that they should take in the same manner and in the same proportions as if it had come to them as intestate estate of the person whose 'heirs' they are called": See, also, *Bassett v. Granger*, 100 Mass. 348; *Rand v. Sanger*, 115 Mass. 124.

The rules of construction thus applied in that state in the cases cited do not probably differ materially, if at all, from those that would be applied under similar circumstances by the courts of this state. In both, the principal object is to ascertain the intention of the parties from the words used to express it; in both, the word "heirs" will be given its strict, primary, technical meaning, if such appears to have been the intention of the parties; and in both it will be given its more comprehensive and popular meaning if it appears to have been used in that sense: *Sweet v. Dutton*, 109 Mass. 589; 12 Am. Rep. 744; *Leake v. Watson*, 60 Conn. 498-506.

Under the laws of Massachusetts, at the time when this certificate was issued, if an intestate left a widow and issue, ²⁴⁹ the widow was entitled to one-third of the residue of the personal property; if he left a widow and no issue the widow took the whole residue of personalty to the amount of five thousand dollars, and one-half of the excess of the residue of such property above ten thousand dollars: Mass. Pub. Stats. 1882, c. 135, sec. 3, p. 770. If, then, this certificate is to be construed as the courts of Massachusetts would probably construe it, and we think it should be, it follows that the

words "heirs at law" must be held to include the widow; and that she is entitled to one-third of the insurance money under the certificate, because that is the share of this money she would take under the laws of that state.

The result thus reached is also, we think, in accordance with the actual intent of Joseph Mullen, so far as the same can be ascertained from the certificate read in the light of the circumstances under which it was made, as they appear of record, and without reference to the rule we have been considering. The certificate is in the nature of a contract of insurance. The money to become due on it, under the laws of Massachusetts (Supp. to the Pub. Stats., sec. 15, p. 811), as appears of record, could not be taken by creditors, and it is fair to presume that this was known to the deceased at the time the certificate was issued. If so, there would be the further presumption that he thus intended to create a fund for the benefit of his family primarily, and not for the benefit of his creditors or his estate; a fund that would go to the members of that family living at the time of his death, not as a part of his estate, but directly by force of the certificate.

He designated the class who were to take as beneficiaries, by the words "heirs at law"; and it is a fair presumption that he used those words for this purpose, in view of the uniform meaning which had been given to them in instruments of a nature similar to this certificate, by the courts of Massachusetts. In short, from the certificate itself, read in the light of the circumstances under which it was made, we think it is fair to conclude that Joseph Mullen used the ²⁵⁰ words "heirs at law" in their popular sense, as meaning those persons who would take his intestate personal property under the statute of distributions of the state of Massachusetts, and that under them, consequently, he meant to include his widow.

The money due upon the certificate at the time of his death formed no part of his estate, but belonged to the beneficiaries. It nowhere appears that the deceased had the power to substitute other beneficiaries in place of the class first designated; and if he had, it is quite certain that he never exercised it. This certificate, then, was in effect a valid agreement, on the part of the association, to pay the money to become due under its provisions to the beneficiaries designated therein. When due the money certainly be-

longed to them, and not to the estate of the deceased: *Connecticut Mut. Life Ins. Co. v. Burroughs*, 34 Conn. 305; 91 Am. Dec. 725; *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60; 19 Am. Rep. 530; *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810.

There is no error apparent upon the record.

In this opinion the other judges concurred.

INSURANCE CONTRACT—LAW OF PLACE.—When a member of a benefit society organized under the laws of one state, and domiciled therein, receives its certificate of membership providing that his devisees, or in case of no will, his heirs, are to receive a designated sum at his death, and then dies while domiciled in another state, with a will, the fund to which his heirs are entitled must be distributed to them according to the intestate laws of the latter state unaffected by the laws of the state of the society's domicile: *Northwestern etc. Aid Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810. To the same effect see *Carnow v. Phoenix Ins. Co.*, 37 S. C. 406; 34 Am. St. Rep. 766, and note. See the extended note to *Ford v. Buckeye State Ins. Co.*, 99 Am. Dec. 668.

INSURANCE—CONSTRUCTION OF CONTRACT—INTENT.—Contracts of insurance must have effect like other written contracts. The intent of the parties must govern, and, when the language is plain, such intent must be gathered from the language: *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809, and note; *Continental Ins. Co. v. Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77; *Renshaw v. Missouri etc. Ins. Co.*, 103 Mo. 595; 23 Am. St. Rep. 904. *Straus v. Imperial etc. Ins. Co.*, 94 Mo. 182; 4 Am. St. Rep. 368, and note;

INSURANCE—BENEFIT SOCIETIES—INTEREST OF INSURED IN FUND.—The insured member of a benefit society has no interest in the fund. He simply has a power of appointment, which, if not exercised, becomes inoperative, and in no event does the insurance money become assets of the insurer's estate: *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. Rep. 260, and note.

"HEIRS AT LAW" DEFINED.—Heirs are the persons in whom real estate vests by operation of law on the death of the one who was last seised. Ordinarily the statute of distributions designates who are entitled to the character of heirs as well as the shares to be enjoyed by them: *Dukes v. Faulk*, 37 S. C. 255; 34 Am. St. Rep. 745, and note. See a full discussion of this subject in the extended note to *In re Ingram*, 12 Am. St. Rep. 81.

SMITH v. DELANEY.

[64 CONNECTICUT, 264.]

PROMISE—STATUTE OF FRAUDS.—If the inducement for a promise for the performance of an act is a benefit to the promisor which he did not before or would not otherwise enjoy, and the act is done upon his request and credit, such promise is an original undertaking, and not within the statute of frauds.

CONTRACT OF INDEMNITY—STATUTE OF FRAUDS.—A special promise made by one person to another that he will see him "all right" if he will sign the bond of a third person, in order to enable the latter to obtain a license to sell intoxicating liquors, and when the promisor gives as a reason for not signing the bond himself that he intends to go into the liquor business with such third person, is not within the statute of frauds.

PROMISE OF INDEMNITY—VALIDITY OF.—A promise of indemnity for the performance of an act not illegal, immoral, or against public policy, is valid.

ACTION to recover the amount of a liquor license bond paid by the plaintiff.

Noble E. Pierce, for the plaintiff.

Marcus H. Holcomb and John J. Jennings, for the defendant.

271 **FENN, J.** The court of common pleas for Hartford county, at the request of the plaintiff and of the defendant Delaney, reserved for our advice the question as to the proper 272 judgment to be rendered, as to said Delaney, upon the following facts found by said court; the other defendant, McGee, having suffered a default.

"On the tenth day of November, 1890, William McGee of Bristol, in said county, defendant, as principal, and the plaintiff as surety, signed a license bond for three hundred dollars to the treasurer of said county.

"The plaintiff executed said bond at the request of the defendant Delaney, who said to the plaintiff, as an inducement to execute said bond, 'I will see you all right,' and also told the plaintiff that he, Delaney, intended to go into the liquor business with said McGee, and gave this as the reason why he did not wish to sign said bond.

"Upon the filing of said bond with the county commissioners, and on the tenth day of November, 1890, a license was issued by them to said McGee, to sell spirituous and intoxicating liquors in said Bristol, and McGee immediately commenced and carried on said business in said town until

the fifteenth day of June, 1891, when said license was revoked by said commissioners, the said McGee having been legally convicted of a violation of the laws relating to intoxicating liquors, and said bond having been thereby forfeited, on the demand of the county treasurer, the plaintiff, on the sixteenth day of October, 1891, paid the amount of said bond, the said McGee having failed to pay the same.

"About a month or six weeks after said McGee began the business of selling spirituous and intoxicating liquors as aforesaid Delaney became a partner in said business with said McGee, and said business was carried on for their joint benefit under the license to McGee alone; but said Delaney had withdrawn from the partnership about two months before the conviction of said McGee as aforesaid.

"Neither McGee nor Delaney has repaid to plaintiff any part of the amount of said bond so paid by the plaintiff to the county treasurer as aforesaid."

The defendant Delaney claims that the complaint was defective, and that one or more of the several demurrers filed should have been sustained. We judge by the language used ²⁷³ in the reservation that this claim was waived in the court below, and no such question reserved. If, however, we are mistaken in this, we think the court below committed no error in overruling such demurrers; certainly none which injuriously affected the defendant, so that they should now be considered: *Vail v. Hammond*, 60 Conn. 378; 25 Am. St. Rep. 330.

The defendant also claims that the finding fails to support the complaint, to demonstrate which his counsel, in their brief, have made use of the "deadly parallel columns," without, however, satisfying us that the contention is correct. Doubtless the language of the finding was not copied from the complaint, but there are no wider differences than are justified by the rules under the Practice Act, 58 Conn. 564, rule 3, that "acts and contracts may be stated according to their legal effect," and that "immaterial variances shall be wholly disregarded."

The main inquiry upon the facts found is whether the contract therein stated is within the statute of frauds. The law upon this subject, namely, whether contracts of indemnity are special promises to answer for the default or miscarriage of another, or are original undertakings, has been correctly said (8 Am. & Eng. Ency. of Law, 673) to be "in a

state of hopeless confusion, arising almost wholly from the different views taken of the scope of the statute. Where *Thomas v. Cook*, 8 Barn. & C. 728, is law, and the statute is confined to contracts of suretyship, results are reached entirely different from those obtained where *Green v. Cresswell*, 10 Ad. & E. 453, is followed, and contracts of indemnity are included in its scope."

In favor of the view of *Green v. Cresswell*, 10 Ad. & E. 453, that contracts of indemnity are within the statute, the case of *Nugent v. Wolfe*, 111 Pa. St. 471, 56 Am. Rep. 291, cited by the defendant; and in favor of the opposite view, held in *Thomas v. Cook*, 8 Barn. & C. 728, the case of *Davis v. Patrick*, 141 U. S. 487, cited by the plaintiff, may be regarded as among the leading authorities. Doubtless, in England, the later case of *Green v. Cresswell*, 10 Ad. & E. 453, has been practically overruled, and the authority of *Thomas v. Cook*, 8 Barn. & C. 728, fully restored: *Wildes v. Dudlaw*, L. R. 19 Eq. 198; *Yorkshire Ry. Wagon Co. v. Maclure*, L. R. 19 Ch. Div. 478. *Thomas v. Cook*, 8 Barn. & C. 728 is also followed in a majority of the American states: Browne's Statute of Frauds, sec. 161 c.

But it is unnecessary to examine the authorities elsewhere, more at large, because the question is not now a new one in our own jurisdiction. The cases of *Stocking v. Sage*, 1 Conn. 519; *Marcy v. Crawford*, 16 Conn. 549; 41 Am. Dec. 158; *Reed v. Holcomb*, 31 Conn. 360, and *Clement's Appeal*, 52 Conn. 464, all bear more or less directly upon the question before us; and although *Reed v. Holcomb*, 31 Conn. 360, and *Clement's Appeal*, 52 Conn. 464, have been thought by various courts and text-writers to be somewhat in conflict, we do not so think, but that, from a fair examination of both, the true rule, to which both are consistent, may be discovered. In *Reed v. Holcomb*, 31 Conn. 360, where the plaintiff indorsed a note of a third party, at the request of the defendant, and upon his oral promise to see it paid, and to save him harmless if it was not paid by the makers, it was held that the statute of frauds did not apply to the case. In *Clement's Appeal*, 52 Conn. 464, in which no reference was made, either by counsel on either side or by the court, to *Reed v. Holcomb*, 31 Conn. 360, Brainerd indorsed notes for Goodwin, at the request of his father, and on the father's oral promise to save him harmless. It was held that this promise was void under the statute of frauds, because not in writing. The distinction

between the two cases was the principle on which *Reed v. Holcomb*, 31 Conn. 360, was expressly stated to rest. In *Clement's Appeal*, 52 Conn. 464, although the promisor was the father of the maker of the notes, and, as such, actuated by parental affection, he had no legal or pecuniary interest whatever, so far as the record disclosed in the transaction. In *Reed v. Holcomb*, 31 Conn. 360, the transaction was for the benefit of the defendant. Without consulting the plaintiff he had taken the note of a firm indebted to him, payable to the order of the plaintiff, doing so for the purpose of getting the plaintiff's indorsement, that he might get the note discounted at the bank. The two cases are therefore in harmony, for the reason that *Reed v. Holcomb*, 31 Conn. 360, is not, as has sometimes been supposed, an authority for the unqualified doctrine of *Thomas v. Cook*, 8 Barn. & C. 728, that a contract of suretyship is but a contract ²⁷⁵ of indemnity, is not within the statute; but only for the more limited doctrine recognized elsewhere in most jurisdictions where *Thomas v. Cook*, 8 Barn. & C. 728, is not followed, and consistent with even *Green v. Cresswell*, 10 Ad. & E. 453, that where the inducement is a benefit to the promisor which he did not before, or would not otherwise, enjoy, and the act is done upon his request and credit, such promise is an original undertaking, and not within the statute.

The earlier Connecticut cases which we have cited are in accordance with this doctrine. The case of *Dillaby v. Wilcox*, 60 Conn. 71, 25 Am. St. Rep. 299, and the earlier cases therein referred to, somewhat relied upon by the defendant, are not in point; but, so far as they incidentally bear upon the question at all, they illustrate and affirm the distinction here made, since they establish the rule that even what is in form a new parol promise to pay the already existing debt of another, may be valid, as an original obligation on the part of the promisor, if based upon a transfer of value "the measure of which is, by the agreement of the parties, the defendant's payment of the third party's debt": *Dillaby v. Wilcox*, 60 Conn. 80; 25 Am. St. Rep. 299, quoting and approving Browne's Statute of Frauds, sec. 214 e.

Applying this established rule of our law to the case before us, we think the defendant is not entitled to avail himself of the statute of frauds. The bond was executed by the plaintiff at the request of the defendant, and presumably entirely upon his credit. At any rate, the only inducement given in

the finding was the defendant's statement, "I will see you all right." He told the plaintiff that he, the defendant, intended to go into the liquor business with McGee, and when the finding adds that "he give this as the reason why he did not wish to sign the bond," it is of course equivalent to saying that he gave it as the reason why he did wish the plaintiff to sign it in his place, namely, as a surety upon a bond, for a license to be issued to McGee. The language used by this court in *Reed v. Holcomb*, 31 Conn. 360, thus becomes as pertinent to this case as it was to that. It was there said (p. 363), referring to the plaintiff's indorsement of the third party's note: "This in substance, we think, was the same as ²⁷⁶ if the plaintiff had indorsed the defendant's own note to enable him to raise money upon it." If that be true, was not the transaction stated in the finding the same, in substance, as if the plaintiff had signed the defendant's own bond, to enable him to procure a license and become a dealer? It seems to us that there is no distinction.

But the defendant insists that if this be so, "if" (we quote from the brief) "from this is to be inferred that there was an understanding known to the plaintiff that McGee and Delaney were to form a partnership and sell liquors, under Mr. McGee's license, and that this intention and understanding was, in any sense, a consideration and inducement for Delaney's promise to the plaintiff, 'I will see you all right,' then said consideration was illegal; the contract between the plaintiff and Delaney was founded upon a consideration which was immoral, illegal, contrary to public policy and the prohibition of the statute, and is void."

It surely needs no citation of authorities to support the position that if this contract was founded upon a consideration, illegal, immoral, or contrary to public policy, it is void, and cannot support an action. So, also, if the contract contemplates acts against public policy, or forbidden by statute, it is inoperative. We also concur fully with the authorities cited by the defendant, all of which are referred to in 11 American and English Encyclopedia of Law, page 346, which holds that "a license granted to one person, who forms a partnership with an unlicensed person, does not authorize the latter to make sales of liquor." But, conceding all this, there is no finding that Delaney contemplated making sales himself, and certainly there can be no presumption that Delaney contemplated, or was understood by the plaintiff to

contemplate, any illegal connection with the proposed business, if there was a legal way in which he might be interested in it. And we think there was, if he was only a silent partner, taking no active participation, and only concerned to the extent of capital invested. On this point we may quote again from one of our own cases already cited, *Marcy v. Crawford*, 16 Conn. 549; 41 Am. Dec. 158. When the same claim that the contract was illegal was made, this court, ²⁷⁷ by Hinman, J., said (p. 553): "Then as to the first error assigned, that the county court did not instruct the jury that the promise claimed to be proved by the plaintiff was an illegal promise, because, as the defendant insisted, it was a promise made in consideration of the commission of an illegal act. Now, there can be no doubt that the law will not enforce a contract to commit an illegal act. A promise to commit a battery, to pull down another's house, or to commit any such willful trespass to another, is illegal and void. But, merely because an act proves to be a trespass, which was not originally supposed to be so, will not render a promise of indemnity for the commission of it void." Again (p. 554): "A promise to indemnify against a trespass is valid, unless it be shown that the promisee knew the act to be a trespass." We do not think the record before us justifies us in finding that the plaintiff knew, understood, or believed that the defendant contemplated the performance of any act illegal, immoral, or against public policy.

The court of common pleas is advised to render judgment, upon the facts found, in favor of the plaintiff, for the amount paid by the plaintiff, with interest thereon and costs.

In this opinion the other judges concurred.

CONTRACTS OF INDEMNITY, WHETHER WITHIN THE STATUTE OF FRAUDS. The object of this note is to show whether a contract of indemnity must be in writing in order to be valid and enforceable, and this question alone is dealt with. A contract of indemnity may be void whether in writing or not, as for want of consideration. Indeed, there can be no question under the statute of frauds, in any case, until it is ascertained that there is a consideration to sustain the promise; without that element the agreement is void before we come to the statute. A naked promise is void, on general principles of law, although in writing: *Mallory v. Gillett*, 21 N. Y. 412. We have, therefore, in the treatment of this subject, excluded all questions as to the validity of the contract, except the one as to the necessity of a writing; and have, with very few exceptions, used those cases only in which some question has been raised as to the statute of frauds. As to when promises to answer for the debt, default, or miscarriage of another are and are not within the statute of frauds, see *Muller v. Rivieri*, 59 Tex. 640; 46

Am. Rep. 291, and extended note thereto; and monographic note to *Packer v. Benton*, 95 Am. Dec. 251-263, wherein the sufficiency of the consideration to support such promises is treated.

With respect to the question as to whether a contract of indemnity is within that clause of the statute of frauds requiring a writing, when one party has induced another to enter into the engagement by a promise to indemnify him against liability, there is great diversity of opinion, and it is impossible to reconcile the authorities, as will be seen by examining the following cases, in which the authorities are collected, and where courts have given the matter thoughtful attention: *Reader v. Kingham*, 13 Com. B. 344; *Lakeman v. Mountstephen*, L. R. 7 Eng. & Ir. App. Cas. 17, and *Mountstephen v. Lakeman*, L. R. 7 Q. B. 196, reversing *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613; *Demeritt v. Bickford*, 58 N. H. 523; *Horn v. Bray*, 51 Ind. 555; 19 Am. Rep. 742; *Anderson v. Spence*, 72 Ind. 315; 37 Am. Rep. 162; *Wolverton v. Davis*, 85 Va. 64; 17 Am. St. Rep. 56; *Easter v. White*, 12 Ohio St. 219; *Dunn v. West*, 5 B. Mon. 376, 382; *Barry v. Ransom*, 12 N. Y. 462. The reasoning of the courts which hold that a contract of indemnity is within the statute of frauds, and invalid unless in writing, is not always the same, but seems to proceed most commonly upon the theory that "where there is an implied liability on the part of a third person to reimburse the plaintiff, or remunerate him for the damages or loss suffered on his, such third person's, account, the promise of the defendant, in an action upon an alleged undertaking to indemnify the plaintiff, is an undertaking collateral to the implied liability of such third person, and so falls within the statute, and must be in writing and signed by the defendant, or some one by him authorized to sign the same": *Bissig v. Britton*, 59 Mo. 204; 21 Am. Rep. 379; *Easter v. White*, 12 Ohio St. 219; *Ferrell v. Maxwell*, 28 Ohio St. 383; 22 Am. Rep. 393; *May v. Williams*, 61 Miss. 125; 48 Am. Rep. 80.

But there are many cases, as will be seen *infra*, in which the contract is an original and independent one, in which there is no debt or default toward the promisee, to which there are no collateral contracts, and in which there is no remedy against the third party. Such contracts are clearly not within the statute: *Anderson v. Spence*, 72 Ind. 315; 37 Am. Rep. 162. If, therefore, a promise of indemnity be not collateral to the liability of some other person to the same party to whom the promise is made, it is not within the statute of frauds; and in the absence of all evidence that there was a liability of any other person to the plaintiff, to which the defendant's promise of indemnity could have been collateral, it must necessarily be treated as an original promise: *Administrators of Beaman v. Russell*, 20 Vt. 205; 49 Am. Dec. 775. There is often much difficulty in ascertaining from the mere words of a promise whether it is a collateral or an original undertaking, and courts must rely upon the particular circumstances of each case; but the great weight of authority supports the proposition that, where the consideration of a promise of indemnity takes its root in a transaction distinct from the original liability, the case is not within the statute, because it then becomes a new and independent contract existing entirely between the immediate parties to it. Since the "downfall" of *Green v. Cresswell*, 10 Ad. & E. 453, this seems to be the doctrine approved by a majority of the courts and text-writers: *Chapin v. Merrill*, 4 Wend. 657; *Reed v. Holcomb*, 31 Conn. 360; *Barry v. Ransom*, 12 N. Y. 462; *Anderson v. Spence*, 72 Ind. 315; 37 Am. Rep. 162; *Smith v. Sayward*, 5 Greenl. 504; *Hoggatt v. Thomas*, 35 La. Ann. 293; *Alger v. Scoville*, 1 Gray, 391; *Aldrich v. Ames*, 9 Gray, 76;

Sanders v. Gillespie, 59 N. Y. 250; *Pike v. Brown*, 7 Cush. 133; *Townsley v. Sumrall*, 2 Pet. 170.

Keeping these statements in mind it is believed that the cases on the subject under consideration are not so conflicting as they at first appear, although the principles announced do not harmonize all of them. It is probable, however, that some of the cases have been erroneously decided, particularly those which confuse the contracts of guaranty and indemnity, "and that they are not to be accepted as true interpreters of the law": *Anderson v. Spence*, 72 Ind. 315; 37 Am. Rep. 162. It must be borne in mind that promises implied by law are not within the statute: *Pike v. Brown*, 7 Cush. 133, 136; and that a promise, the leading object of which is a benefit to the promisor, which he did not before enjoy, is not within the statute, although its effect be to discharge another from an obligation: *Alger v. Scoville*, 1 Gray, 391; *Pike v. Brown*, 7 Cush. 133, 136. It is believed that the following arrangement and classification of the law on the subject under consideration will make it plain.

ENGLISH CASES.—It was early held at *nisi prius* that a promise by the indorser of an unpaid note to indemnify the holder if he would proceed to enforce payment from the other parties to the note was void under the statute of frauds, unless such promise was in writing, as it was a promise to answer for the debt or default of another: *Winckworth v. Mills*, 2 Esp. 484; and in *Green v. Cresswell*, 10 Ad. & E. 453, where plaintiff had become bail for a stranger, in consideration of defendant's request, and of defendant's promise to indemnify plaintiff against the consequences, it was held that no action would lie upon such promise unless it was in writing, as the statute of frauds applied. This case overruled *Thomas v. Cook*, 8 Barn. & C. 728, where the same court held that a promise of B to hold A harmless against the consequences of his entering with B and C, at B's request, into a joint bond to indemnify D against debts due from C and D, was binding, though not in writing, the court being of the opinion that a promise to indemnify does not fall within the words or policy of the statute. *Green v. Cresswell*, 10 Ad. & E. 453, was distinguished, if nothing more, in *Batson v. King*, 4 Hurl. & N. 739, holding that the statute of frauds has no application to a case when a party draws a bill of exchange to be accepted by a second party, and indorsed by a third, where such acceptor and indorser want money, and are both principals in the transaction, and where the bill is issued upon such indorser's promise that the maker of the bill shall not be called upon for payment. It further appears that the doctrine of *Thomas v. Cook*, 8 Barn. & C. 728, has been reinstated by cases decided subsequently to *Green v. Cresswell*, 10 Ad. & E. 453. Thus, where the plaintiff, an occupant of land, at the request of the defendant, and upon a promise of indemnity, resists a suit of the vicar for tithes, the promise is not one required by the statute of frauds to be in writing: *Adams v. Dansey*, 6 Bing. 506. The question as to whether a contract to indemnify against liability for the performance of an act must be in writing was elaborately considered in *Reader v. Kingham*, 13 Com. B., N. S., 344, where the cases are reviewed, and the conclusion reached that it need not be. This case was a promise to pay the bailiff of a county court, who was about to arrest H., under a warrant of contempt for nonpayment of a judgment debt, and in consideration that the officer would forbear to execute the warrant, a certain sum, which the judgment creditor was willing to take in satisfaction, or surrender H. This was held not to be an agreement by the defendant to be answerable for the debt or default of H., but an original promise by the defendant to pay the money or sur-

render H., and the validity of which was not affected by the fact that it was not in writing. So in *Mountstephen v. Lakeman*, L. R. 7 Q. B. 196; *Lakeman v. Mountstephen*, 7 Eng. & Ir. App. Cas. 17, reversing *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613, a contractor had, under the orders of the board of health of a certain town, formed a main sewer in the town, and under the orders of the board had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer. The board had, under the statute, given notice to the inhabitants of certain streets to make these connecting drains, the effect of the notice being that if the said inhabitants did not make those connecting drains the board might make them, and charge the expenses on the defaulting inhabitants. The notice was disregarded, and no subsequent resolution was passed by the board. The contractor was about to take away his carts and working materials, when the chairman of the board of health said to him: "What objection have you to making the connections"? The contractor replied: "I have none, if you or the board will order the work, or become responsible for the payment." The chairman then said: "Go on and do the work, and I will see you paid." The contractor, Mountstephen, did the work, and, the board refusing to pay, he sued the chairman of the board, Lakeman, for the amount. The court held that the words of the chairman were properly left to the jury as evidence to sustain a claim against him personally, and that they did not constitute a promise to pay the debt of another, so as to come within the operation of the statute of frauds. The words "I will see you paid" may mean "I will pay you," or "You shall be paid"; but they do not necessarily mean that "I will see that somebody else pays you," or that "I will see that your principal debtor pays you, and, if he does not, I will be the surety for payment." The meaning of this phrase must depend somewhat on the other facts of the case: *Mountstephen v. Lakeman*, L. R. 7 Q. B. 196, per Pigott, B. Again, a parol agreement between stockholders and another person that he shall introduce clients to them for whom they shall transact business upon the stock exchange, and that he shall receive half of the commissions earned by such brokers from any clients introduced by him, paying half of any loss which may be incurred in respect to such transactions, is not, so far as his agreement to meet such losses is concerned, a special promise to answer for the debt or default of another person within the statute of frauds, but is merely a contract of indemnity, the main object of which is to regulate the terms of his employment, and to which the statute does not apply: *Sutton v. Grey* (C. A.), [1894] 1 Q. B. 285. This case has a close analogy to the case of a *del credere* agency, to which the statute of frauds does not apply, because the object of such a contract is to regulate the terms of the agency. With respect to such agents "a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by the vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given": *Couturier v. Hastie*, 8 Ex. 40, 56. Such a contract is neither a guaranteeing nor a contract of sale, and the statute of frauds is out of the question: *Couturier v. Hastie*, 8 Ex. 40, 56.

One of the most pointed cases upon the subject under consideration is that of *Wildes v. Dudlow*, L. R. 19 Eq. Cas. 198, decided in 1874. This

was a case where a son, at the request of, and on a verbal offer by, his father, to indemnify him against loss, joined with a third party in a joint and several promissory note which the son was afterwards compelled to pay. The son afterwards became the executor of his father, and the question was whether he was entitled to recoup himself out of the testator's estate for the sum so paid, or to account for the same. The opinion by Sir R. Malins, V. C., is quoted in full, and is as follows:

"The question is, whether this contract is, within the fourth section of the statute of frauds, required to be in writing. The words of that clause are, 'charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another.' What was the promise made by the testator in this case to the defendant John Dullow? It was not, 'I engage with you to be answerable to you for the debt of Wildes,' because Wildes did not owe Dullow anything, but he says, 'If you will do a certain act, namely, render yourself liable for that debt, I will indemnify you.' I think it perfectly clear that the only contract which I have to consider is that between father and son. It is not that he will pay the debt of Wildes, but that, if the son will guarantee Wilde's debt, he will see him harmless, or, in other words, indemnify him. If one man could induce another to alter his line of conduct in that way, and then meet him with the statute of frauds, that statute, instead of being a protection against fraud, would be the direct means of fraud. The statute enacts that if one man promises to pay the debt of another the promise is void unless it is in writing, and no one doubts that to be the law; but it appears to me, upon principle, so plain that the present case is not within the statute, that I am very glad to find that what occurred to me as being the proper view of the case is finally decided to be the law on the subject. There has been a conflict of authority, and I confess I am surprised to find that there has been so much conflict. The point was originally decided by two of the most eminent judges known on the bench (Mr. Justice Bayley and Mr. Justice Parke, afterwards Lord Wensleydale) in the case of *Thomas v. Cook*, 8 Barn. & C. 728, and they decided it upon the plainest principles of common sense and justice. I was therefore surprised to find that in a later case of *Green v. Cresswell*, 10 Ad. & E. 453, the same court, constituted at that time of other judges, had taken a different view, and a view which, if it had been maintained, I possibly should not have felt myself obliged to follow. But I am happy to find that, the matter having been most carefully and elaborately considered in the case of *Reader v. Kingham*, 13 Com. B., N. S., 344, when the full number of judges was present, the case of *Green v. Cresswell*, 10 Ad. & E. 453, was overruled, and the law, as laid down by *Thomas v. Cook*, 8 Barn. & C. 728, restored. The learned judges commented upon those cases, and said that the law was accurately laid down in *Thomas v. Cook*, 8 Barn. & C. 728; and I entirely agree in that expression of opinion. I accordingly decide that where one person induces another to enter into an engagement, by a promise to indemnify him against liability, that is not an agreement within the statute of frauds, and does not require to be in writing. This is a case in which the father induced his son to guarantee the debt of his son-in-law upon a promise that he would see him harmless. Upon every principle of justice he is bound to indemnify him; and I think, therefore, that the son is perfectly right in helping himself out of the estate which has come into his hands. The force of the decision in *Reader v. Kingham*, 13 Com. B., N. S., 344, was somewhat shaken by the opinion expressed by Mr. Justice Blackburn in *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613; but as the deci-

sion of the queen's bench in that case was reversed in the exchequer chamber (*Mountstephen v. Lakeman*, L. R. 7 Q. B. 196), and also in the house of lords (*Lakeman v. Mountstephen*, L. R. 7 Eng. & Ir. App. Cas. 17), the law rests on the plain and reasonable ground upon which it was put in *Reader v. Kingham*, 13 Com. B., N. S., 344. The decision is, therefore, entirely in favor of the defendant; and I hold that the chief clerk has done perfectly right in allowing this one thousand pounds with interest. Therefore, the motion to vary the certificate in that respect must be dismissed with costs."

AMERICAN CASES.—1. *Bail*.—Notwithstanding the rule announced in *Kingsley v. Balcome*, 4 Barb. 131, that a parol promise to indemnify and save the promisee harmless from all damages by reason of his becoming bail for a third person must be in writing in order to avoid the statute of frauds, the prevailing opinion is that an oral promise, for a valuable consideration, to indemnify another from his liability as bail for a third person, is not within the statute of frauds: *Aldrich v. Ames*, 9 Gray, 76; *Perley v. Spring*, 12 Mass. 297; *Harrison v. Sawtel*, 10 Johns. 242; 6 Am. Dec. 337. The advantage resulting to the promisor in such a case from the act of the promisee is a sufficient consideration, as it saves him from becoming bail himself, or procuring some other person to become bail: See case last cited.

2. *Costs and Expenses of Suit—Damages—Judgment Expenditures—Loss of Services*.—In one case a promise to indemnify the plaintiff from all costs and damages by reason of any suit brought against him on account of certain goods in his possession seized on execution and alleged to belong to the defendant was held to be a promise to answer for the default of another, and that to be binding it had to be reduced to writing: *Nixon v. Vanhise*, 5 N. J. L. 491; 8 Am. Dec. 618. So, in another early case, a parol promise to pay damages in case of failure where the promisee consented to forbear to sue one person, and to bring suit against another, was held to be within the statute of frauds: *Turner v. Hubbell*, 2 Day, 457; 2 Am. Dec. 115; but the better doctrine is that a promise to indemnify against costs and expenses of suit or damages, or against a judgment, which results from the performance of an act not illegal in itself, is valid and enforceable, though not in writing: *Marcy v. Crawford*, 16 Conn. 549; 41 Am. Dec. 158; *Peck v. Thompson*, 15 Vt. 637; *Soule v. Albac*, 31 Vt. 142; *Harrison v. Sawtel*, 10 Johns. 242; 6 Am. Dec. 337. The same principle applies to other expenditures and services. For example, where the preceptor of an academy requests a person to assist in getting up an exhibition of its students and to procure music therefor, and it is understood between them that the preceptor will indemnify him for his services and expenditures, a subscription list being relied upon for raising the necessary funds, the implied promise arising from the request and understanding is an original one, and not within the statute of frauds. The preceptor must pay what the subscription does not: *Walker v. Norton*, 29 Vt. 226.

3. *Signing and Indorsing Notes*.—Some of the cases hold that a promise to save another harmless, if he will indorse a third party's notes or bills, is void under the statute of frauds, unless it is in writing: *Clement's Appeal*, 52 Conn. 464; *Carville v. Crane*, 5 Hill, 483; 40 Am. Dec. 364; *Kelsey v. Hibbs*, 13 Ohio St. 340; and that there can be no liability on an implied promise to indemnify, it not being in writing: See case last cited. But the weight of authority sustains the proposition that a contract of indemnity for signing the note of a third party is not within the statute of frauds, and need not be in writing: *Administrators of Beaman v. Russell*, 20 Vt. 205; 49 Am. Dec. 775; and that a promise to indemnify one, and to

save him harmless, for his act in indorsing the note of a third party, is not within the statute of frauds, and need not be in writing: *Jones v. Bacon*, 72 Hun, 506; *Reed v. Holcomb*, 31 Conn. 360; *Myers v. Morse*, 15 Johns. 425; *Vogel v. Melma*, 31 Wis. 306; 11 Am. Rep. 608; *Shook v. Vanmater*, 22 Wis. 532; *Alger v. Scoville*, 1 Gray, 391. In the case last cited A., by a verbal contract, agreed to transfer to S. his stock, which was the greater part of the whole stock in a manufacturing corporation, and a note of the corporation held by him; and S. agreed to convey to A. a certain farm, and to take A's interest in the corporation, and to indemnify him against his indorsements on the outstanding notes of the corporation. A. accordingly transferred his stock and note to S.; received from S. a conveyance of the farm; and it was held that the promise of S. to indemnify A. against his liability on the notes of the corporation was not without consideration, and was not a promise to answer for the debt or default of another within the statute of frauds.

4. *Indemnifying Surety*.—Some of the cases hold that a verbal promise to indemnify one who becomes surety on bond, note, or other instrument for a third party is within the statute of frauds, and not enforceable: *Baker v. Dillman*, 12 Abb. Pr. 313; *Waterman v. Resseter*, 45 Ill. App. 155, reversed in *Resseter v. Waterman*, 151 Ill. 169; *Brown v. Adams*, 1 Stew. 51; 18 Am. Dec. 36; *Nugent v. Wolfe*, 111 Pa. St. 471; 56 Am. Rep. 291; *Ferrell v. Maxwell*, 28 Ohio St. 383; 22 Am. Rep. 393.

This rule has been applied to an oral promise to indemnify one for becoming surety on a third person's replevin bond: *Brush v. Carpenter*, 6 Ind. 78, overruled in *Horn v. Bray*, 51 Ind. 555; 19 Am. Rep. 742; *Bissig v. Britton*, 59 Mo. 204; 21 Am. Rep. 379; *Easter v. White*, 12 Ohio St. 219; or for becoming surety on another's bail bond in a criminal case: *May v. Williams*, 61 Miss. 125; 48 Am. Rep. 83; or for becoming surety or guarantor in a lease: *Braul v. Whelan*, 18 Ill. App. 186. So, where S. signed a promissory note payable to F. & M. Bank as surety for T. & McL., and afterwards entered into a verbal agreement with the bank that it should pay him one-half of any loss he might sustain through the failure of T. & McL. to pay said note and certain other debts for which he was surety for them, it was held that the agreement was within the statute of frauds and void: *Farmers' etc. Bank v. Spear*, 49 Ill. App. 509. But, while a promise of indemnity by one not a party to an obligation to induce another to become surety thereon must, according to the authorities just cited, be in writing to be enforceable; yet, if a surety on an obligation, upon his promise of indemnity, procures another to become surety with him on the same instrument, the promise is not within the statute, for the indemnity promised is to secure his own default: *Ferrell v. Maxwell*, 28 Ohio St. 383; 22 Am. Rep. 393. *Contra*, *Wolverton v. Davis*, 85 Va. 64; 17 Am. St. Rep. 56; *Jones v. Letcher*, 13 B. Mon. 363; *Hoggatt v. Thomas*, 35 La. Ann. 298; *Blake v. Cole*, 22 Pick. 97.

Thus, a verbal agreement of indemnity by the surety on an administration bond, whereby he induces another to sign the same bond as surety with him, is valid and enforceable between the parties: *Ferrell v. Maxwell*, 28 Ohio St. 383; 22 Am. Rep. 393. *Contra*, *Wolverton v. Davis*, 85 Va. 64; 17 Am. St. Rep. 56, a contest between two sureties on a sheriff's bond. So one surety of an executor who procures another to be bound with him as joint surety, upon his promise to save him harmless, is liable on such promise, though it is not in writing: *Jones v. Letcher*, 13 B. Mon. 363. So with a contract of indemnity, under like circumstances, between the sure-

ties on a treasurer's bond: *Hoggatt v. Thomas*, 35 La. Ann. 298; or an administrator's bond: *Blake v. Cole*, 22 Pick. 97.

The most generally accepted doctrine is that a promise by one person to indemnify another if he will become security for a third person is an original promise, not within the statute of frauds, and need not be in writing: *Dunn v. West*, 5 B. Mon. 376; *Lucas v. Chamberlain*, 8 B. Mon. 276; *Horn v. Bray*, 51 Ind. 555; 19 Am. Rep. 742; *Anderson v. Spence*, 72 Ind. 315; 37 Am. Rep. 162; *Keesling v. Frazier*, 119 Ind. 185; *Jones v. Shorter*, 1 Ga. 294; 44 Am. Dec. 649; *Smith v. Sayward*, 5 Greenl. 504; *Garner v. Hudgins*, 48 Mo. 399; 2 Am. Rep. 520; *Barry v. Ransom*, 12 N. Y. 462; *Resseter v. Waterman*, 151 Ill. 169; *Chapin v. Lapham*, 20 Pick. 467; *Demeritt v. Bickford*, 58 N. H. 523; *Chapin v. Merrill*, 4 Wend. 657; *Holmes v. Knights*, 10 N. H. 175; *Minick v. Huff* (Neb., June 26, 1894), 59 N. W. Rep. 795; but may be proved by parol: *Stocking v. Sage*, 1 Conn. 518, 524; *Barry v. Ransom*, 12 N. Y. 462; *Jones v. Letcher*, 13 B. Mon. 363; *Horn v. Bray*, 51 Ind. 555; 19 Am. Rep. 742; *Hoggatt v. Thomas*, 35 La. Ann. 298.

This rule has been applied to a contract of indemnity for becoming surety on an injunction bond: *Lucas v. Chamberlain*, 8 B. Mon. 276; or promissory note: *Horn v. Bray*, 51 Ind. 555; 19 Am. Rep. 742; *Smith v. Sayward*, 5 Greenl. 504; *Garner v. Hudgins*, 48 Mo. 399; 2 Am. Rep. 520; *Resseter v. Waterman*, 151 Ill. 169; *Chapin v. Lapham*, 20 Pick. 467; *Demeritt v. Bickford*, 58 N. H. 523; or on a recognizance for the appearance of defendant in a criminal case: *Anderson v. Spence*, 72 Ind. 315; 37 Am. Rep. 162; *Keesling v. Frazier*, 119 Ind. 185; *Holmes v. Knights*, 10 N. H. 175; or on a bond to enforce faithful performance of duties in the collection of taxes: *Barry v. Ransom*, 12 N. Y. 462; or on an agreement to pay what may remain due on goods sold: *Chapin v. Merrill*, 4 Wend. 657; or for a firm on a debt due to a fourth person: *Minick v. Huff* (Neb., June 26, 1894), 59 N. W. Rep. 795.

5. *Various Other Promises.*—A promise by A to B, in consideration of property delivered to him by B, to pay sundry debts of B, is as to B's creditors invalid under the statute of frauds, unless it is in writing: *Clapp v. Lawton*, 31 Conn. 95. But a promise to indemnify an officer for selling, on execution, property claimed by the defendant in the execution to be exempt, by law, from seizure and sale on execution, is good, and may be enforced though such promise is not in writing: *McCartney v. Shepard*, 21 Mo. 573; 64 Am. Dec. 250; *Tarr v. Northey*, 17 Me. 113; 35 Am. Dec. 232. So with a promise made by a principal to his agent to indemnify the latter for a loss sustained by him in the principal's service, occasioned by the wrongful act of a third person: *Stocking v. Sage*, 1 Conn. 518. So where one agrees with another that he will pay one-half of the damages which may be recovered against a third party for fishing in the millpond of a fourth person, and one-half of the expenses of defending against such a suit as may be brought against him for such fishing: *Marcy v. Crawford*, 16 Conn. 549; 41 Am. Dec. 158. A promise, where C., a newsboy, wanted papers, that "I will be responsible for the papers he shall take," is not within the statute of frauds, but an absolute and original contract: *Chase v. Day*, 17 Johns. 114. In *Parker v. Benton*, 35 Conn. 343, 95 Am. Dec. 276, where a person not before liable agreed, upon a certain consideration and indemnity, to pay the debt of a third person, and, as a part of the arrangement, the original debtor was discharged from his indebtedness, the agreement was held not within the statute of frauds, but it would have been otherwise had the original debtor continued liable. An oral contract whereby G., claiming to have an interest in a pat-

ent hay fork, and being about to organize a company to deal in the fork and in rights under the patent, promised B., in consideration that he would become a member of the company so to be organized, and subscribe and take two shares therein, and in payment therefor give his promissory note, that such shares should not cost him any thing, and that he, G., as soon as the company should be organized, would find a man to buy the shares and take them off B's hands and pay him the amount of his note, and that he, B., should not be put to any cost or expense on account of the shares or note, is not within the purview of the statute: *Green v. Brookins*, 23 Mich. 48; 9 Am. Rep. 74.

6. "*I Will See You Paid*," etc., if A employs you, has been held to be a collateral undertaking, and, therefore, not binding unless in writing: *Skinner v. Conant*, 2 Vt. 453; 21 Am. Dec. 554; and there is force in such holding, because the language implies that some one else than the promisor was also bound; but the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise: *Davis v. Patrick*, 141 U. S. 479. Compare, as to this expression, "English cases," *supra*, and note to *Packer v. Benton*, 95 Am. Dec. 252.

7. *Consideration*.—Even in those few cases where the statute of frauds requires the contract of indemnity to be in writing there is a sharp conflict of decision as to whether the consideration, as well as the promise, must be stated in writing, but, in view of the present disposition of the courts to restrict the doctrine of the statute of frauds, so far as concerns the necessity of a writing to make valid a contract of indemnity, it would be unprofitable to pursue the question of consideration any further: See *Baker v. Dillman*, 12 Abb. Pr. 313; *Sage v. Wilcox*, 6 Conn. 81, 93, and note.

CLYMA v. KENNEDY.

[64 CONNECTICUT, 810.]

JUDGES—DISQUALIFICATION OF.—A judge is disqualified from acting judicially in a case in which he has any pecuniary interest; but he is not disqualified by reason of having an incidental interest, not pecuniary.

JUSTICE OF THE PEACE—DISQUALIFICATION OF.—A justice of the peace is not disqualified from trying and sentencing one who has published a newspaper libel against him.

JUDGMENT—GOOD IN PART, BAD IN PART—VALIDITY OF—APPEAL.—When a judgment is not an entirety and is good in part, but erroneous in part, it will, on appeal, be set aside only as to the erroneous part where the two parts are separable.

JUDGMENT—ERRONEOUS IN PART—DAMAGES—NEW TRIAL.—If the only error in a judgment is in the assessment of damages, and a new trial is ordered, it will be confined to a reassessment of the damages.

ACTION to recover damages for an alleged false imprisonment. Kennedy was an attorney at law; Clancy, a grand juror; and Tuttle, a justice of the peace. Kennedy, at the

request of Clancy, drew up a complaint, charging plaintiff Clyma with a criminal libel in causing to be published in a newspaper certain false, malicious, and scandalous statements concerning Tuttle, as to his conduct in the trial of a civil cause tried by him as a justice of the peace. Clyma was tried before Tuttle, as a justice of the peace, convicted, and sentenced to pay a fine. In default of payment he was committed to jail, and remained there one night and two days, when he was released on *habeas corpus* proceedings, and brought his action.

George E. Terry, for the appellants.

Henry C. Baldwin and Robert E. Hall, for the appellee.

317 ANDREWS, C. J. We think the district court erred in holding that Justice Tuttle was disqualified to hear and determine the grand juror complaint for libel, by reason of interest. It was doubtless indecorous and unwise for him to try the case, because it exposed him to the appearance of 318 seeking to revenge an insult to himself. There is no statute by the terms of which he was forbidden to act in the case; and we are not able to see that he had any such interest in it as made his action void. He was not a party to the cause. He had no pecuniary interest in the subject matter of the action. It was not his own cause. He was not the moving party. He was not liable for costs, nor was it possible for him to recover any thing by any judgment which might be rendered. The event of the proceeding could not bring him gain, nor subject him to any loss. The fees which he might receive do not constitute an interest in the proceedings: *Commonwealth v. Keenan*, 97 Mass. 589. Justice Tuttle had no interest in the cause other than such as he had as a citizen—as one of the public.

The interest in a cause which of itself disqualifies a judge from acting therein is a pecuniary one—similar to the interest which a party in a civil action has in it. All the cases ancient and recent are to this effect. *Bonham's case*, 8 Coke, *226, was an action brought by Thomas Bonham against George Turner and others for a false imprisonment. The defendants pleaded in bar the charter of the "College or Commonalty of the Faculty of Physic in London," by which it appeared that certain persons, called the censors of that college, might summon before themselves any one who practiced physic, for examination, and, on finding such person to

be unskillful in such practice, impose a fine upon him, one moiety of which was to be paid to themselves; and alleged that the plaintiff had been so summoned and examined, and had been ordered to pay a fine of one hundred shillings, and that for the nonpayment of fine he had been arrested and imprisoned. Upon this plea the case says (p. *234): "The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture; *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem suæ rei esse judicem.*" *Day v. Savadge*, Hob. 85, 87, is of the same kind. These are the oldest cases found in the books. Recent ones are *Fletcher* ³¹⁹ v. *Peck*, 6 Cranch, 87, 133; *Taylor v. Porter*, 4 Hill, 146; 40 Am. Dec. 274; *Doolittle v. Clark*, 47 Conn. 316; *Parrott v. Housatonic R. R. Co.*, 47 Conn. 575; *Dyer v. Smith*, 12 Conn. 384. The case most strongly pressed by the plaintiff was *Schroder v. Ehlers*, 31 N. J. L. 44. A statute of that state provided that certain trespasses to lands might be punished by a fine which went to the owner of the land. The defendant in the case was a justice of the peace, and was the owner of the land on which such a trespass had been committed by the plaintiff. The defendant had arrested the plaintiff, brought him before himself, and sentenced him to pay a fine. The case was a writ of error to reverse that judgment. In the course of the opinion the court says: "The entry upon the land in question was in no wise a breach of the peace, but a simple tort of a civil character. Its punishment appertained not to criminal, but to civil jurisdiction." The judgment was reversed on the ground that the defendant was disqualified by interest from acting in the case: *Cooley on Torts*, 421. The cases of *Rex v. Great Yarmouth*, 6 Barn. & C. 646, and *Rex v. Hoseason*, 14 East, 605, cited by the plaintiff, are cases which, though criminal in form, are really civil in effect. In each of these cases the magistrate who tried it was the complainant or moving party in the prosecution.

The complaint in the case before us alleges, as ground upon which damages were demanded, the arrest of the plaintiff on the warrant signed by justice Tuttle, and the detention before him, as well as the arrest on the *mittimus*, the being taken to jail, and the imprisonment there. We have shown that justice Tuttle had authority to issue the warrant and to try the case and to pass sentence.

The district court also found that the *mittimus* issued by justice Tuttle did not properly state the cause of commitment. From this finding there is no appeal. We think the *mittimus* was void, and that the plaintiff is entitled to recover damages for whatever was done under it. All the acts done by the defendants, or any of them, subsequent to the passing of the sentence, were unlawful, viz., the arrest ³²⁰ of the plaintiff on the *mittimus*, the taking him to and the imprisonment in the common jail. For these acts the plaintiff is rightfully entitled to demand and recover damages. It is altogether probable that the damages awarded by the trial court were assessed mainly for the acts last named. But there is no rule furnished in the record by which this court can determine. If there was such a rule there would be no need of a new trial in the case. This court could in such a case set aside that part of the judgment which was erroneous, and affirm that part which was not erroneous: *Stebbins v. Waterhouse*, 58 Conn. 370, 375; *Sherwood v. Sherwood*, 32 Conn. 15.

It appears that Kennedy drew up the *mittimus*. He participated in the unlawful acts for which the plaintiff is entitled to recover damages. The judgment properly went against him.

There must be a new trial, but it should be limited solely to the assessment of damages.

There is error and a new trial is granted. The new trial to extend only to the assessment of damages as herein indicated.

In this opinion the other judges concurred.

JUDGES — DISQUALIFICATION — BIAS.—A judge is not disqualified from trying a proceeding in contempt by the fact that the misbehavior of the respondent is the publication by him of a libel in large part against the judge, where the offense constituting the contempt consists of the tendency of the act to prevent a fair trial of a cause then pending in the court: *Myers v. State*, 46 Ohio St. 473; 15 Am. St. Rep. 638. A judge is not disqualified from trying a case from the fact that he is convinced of the guilt of the accused from facts coming to his knowledge during the course of a previous trial: *Heflin v. State*, 88 Ga. 151; 30 Am. St. Rep. 147, and note. See the note to *Ex parte Harris*, 23 Am. St. Rep. 550, and the extended note to *Moses v. Julian*, 84 Am. Dec. 126.

PRICE v. SOCIETY FOR SAVINGS.

[64 CONNECTICUT, 862.]

PENSION MONEY—EXEMPTION OF FROM ATTACHMENT AND EXECUTION.—

STATUTES which protect pension money from attachment and execution are remedial in their nature, and should be liberally construed in favor of the pensioner.

PENSION MONEY—ATTACHMENT AND EXECUTION—STATUTES—SAVINGS BANK

DEPOSIT.—Under that clause of section 1164, General Statutes of Connecticut, exempting "any pension moneys received from the United States while in the hands of the pensioner," a savings bank deposit, consisting exclusively of the proceeds of a pension check received from the United States, is exempt from attachment and execution.

ACTION of *scire facias* against a garnishee. The original debtor, Frederick T. Covell, had six hundred dollars on deposit in the Society for Savings subject to the conditions stated in his deposit-book. This money was part of the proceeds of a pension check received from the United States, and was deposited on the same day that the check was cashed. These facts were disclosed by the answer to which plaintiff demurred, and the questions arising on the demurrer were, with the consent of the parties, reserved for the advice of the appellate court.

William F. Henney, for the plaintiff.

Joseph L. Barbour, for the defendant.

365 BALDWIN J. The Revised Statutes of the United States, section 4747, provide that "no sum of money due, or to become due, to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." This statute protects pension money from attachment so long as it remains due to the pensioner, but not after it has been actually paid over and has come into his possession: *Spelman v. Aldrich*, 126 Mass. 113; *Friend v. Garcelon*, 77 Me. 25; 52 Am. Rep. 739; *Rozelle v. Rhodes*, 116 Pa. St. 129; 2 Am. St. Rep. 591.

General Statutes, section 1164, exempts from attachment or execution "any pension moneys received from the United States, while in the hands of the pensioner." The validity of the plaintiff's attachment must therefore depend on whether that part of Covell's pension money which he de-

posited with the defendant can be considered as still in his hands.

The deposit, as soon as made, transferred the title to the ³⁶⁶ particular bills or specie, which were deposited, from the pensioner to the savings bank. But he also became substantially a part owner of all the assets of the bank. It was an agency for receiving and loaning money on account of its depositors: *Savings Bank v. New London*, 20 Conn. 111; *Bunnell v. Collinsville Savings Soc.*, 38 Conn. 203; 9 Am. Rep. 380; *Osborn v. Byrne*, 43 Conn. 155; 21 Am. Rep. 641.

A pension is a bounty for past services rendered to the public. It is mainly designed to assist the pensioner in providing for his daily wants. Statutes protecting his interest in it, until so used, are of a remedial nature and entitled to a liberal construction: *Montague v. Richardson*, 24 Conn. 338, 348; 63 Am. Dec. 173; *Patten v. Smith*, 4 Conn. 450, 454; 10 Am. Dec. 166; *Yates County Nat. Bank v. Carpenter*, 119 N. Y. 550; 16 Am. St. Rep. 855.

It would be unreasonable to require a pensioner to keep so large a sum as six hundred dollars in his personal custody until he had occasion to expend or opportunity to invest it. It would be still in his hands, within the meaning of the law, though left with another for safekeeping, and would still retain its original character as pension money: See *United States v. Hall*, 98 U. S. 343, 358. The natural depository, in case of a sum so large as six hundred dollars, would be some kind of a trust or banking institution. The fund in controversy was placed in a savings bank, where, so far as appears, the pensioner had no previous account. It was a single deposit, entered upon a pass-book, where it constituted the sole credit in his favor, and no dividend from the profits of the bank had or could have been declared upon it prior to the attachment. He simply exchanged his ownership of six hundred dollars for an ownership of such part of the property of the defendant as corresponded to the proportion between that sum and the total of its net assets; with the right to take out the amount deposited, in whole or part, on demand, after reasonable notice, provided he withdrew in all no more than his proper share, as a part owner of the funds of the institution: *Osborn v. Byrne*, 43 Conn. 159; 21 Am. Rep. 641. Presumably the defendant had assets ample to satisfy its depositors in full, and therefore the pensioner ³⁶⁷ could, at his discretion, have drawn out the sum deposited, at any time.

While in the bank it was in the hands of an institution conducted for the sole benefit of its depositors, and of which they were the equitable owners; and although the bills or coin that the pensioner originally left there could no longer be identified, and it might be that they and all the cash funds then belonging to the bank had been loaned out, or otherwise invested, it is our opinion that his pension money can fairly be said to have been still in his hands, within the meaning of our statute of exemptions.

The court of common pleas is advised to render judgment for the defendant on the demurrer to the second paragraph of the answer.

In this opinion the other judges concurred.

PENSION MONEY DEPOSITED IN BANK—WHETHER EXEMPT FROM EXECUTION OR ATTACHMENT.—Attachment does not lie against the proceeds of a pension check, deposited by the pensioner with a bank for collection, and by it collected and placed to his credit as a deposit: *Reiff v. Mack*, 160 Pa. St. 265; 40 Am. St. Rep. 720, and note. *Contra: Cranz v. White*, 27 Kan. 319; 51 Am. Rep. 408, and note. Pension money from the United States is not exempt from attachment or execution after it is received by the pensioner, and by him deposited in the hands of a third person for safekeeping: *Ross v. Rhodes*, 116 Pa. St. 129; 2 Am. St. Rep. 591, and extended note.

IN RE CURTIS.

[64 CONNECTICUT, 501.]

AWARD—IMPEACHMENT OF.—The proper practice in impeaching an award rendered upon a submission under rule of court for any cause, whether apparent upon the face of the award or for extrinsic causes, is to remonstrate against the acceptance of the award by the court.

AWARD—EQUITABLE RELIEF AGAINST.—A court of equity will not set aside an award rendered upon a submission under rule of court when it is within the submission, and there is no claim that the arbitrators failed to act on all matters submitted to them, or that they undertook to act on any matters not submitted, except for partiality and corruption in the arbitrators, mistake on their own principles, or fraud, or misbehavior in the parties.

AWARD—POWER TO ACCEPT OR REJECT.—The power given by statute to a court to accept and award implies the power to reject it.

AWARD—MUST CONTAIN WHAT.—The award must contain the actual decision of the arbitrators, which is the result of their consideration of the various matters submitted to them; but it need contain nothing else.

ARBITRATION—DEFINITION.—Arbitration is an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to the established tribunals of justice, and is

intended to avoid the formalities, the delay, the expense, and vexation of ordinary litigation.

ARBITRATORS ARE NOT OFFICERS.—When the submission to arbitration is made a rule of court the arbitrators are not officers of the court, but are the appointees of the parties, as in cases where there is no rule of court.

ARBITRATORS—GRANT OF POWER TO.—A submission that arbitrators shall proceed upon the principles of equity, to the end that each party may receive all that is justly due him, does not limit the arbitrators, but is a liberal and highly creditable grant of power.

ARBITRATORS—FINDINGS OF FACT.—Arbitrators are not required by law to make findings of fact in the cases decided by them.

ARBITRATORS—ACTION OF.—Arbitrators do not act improperly in omitting some detail in their award, which neither the law nor the submission makes it their duty to observe.

ARBITRATORS—PAROL EVIDENCE TO EXPLAIN TERMS USED IN CONTRACT. Where one of the claims submitted to arbitrators is the alleged breach of a contract to “work” a certain street, parol evidence is admissible to explain the special meaning of this term as understood by the parties at the time the contract was made, and such evidence is not limited to expert testimony.

ARBITRATORS—DAMAGES.—When one of the parties to an arbitration claims damages it is within the province of the arbitrators to determine whether they are proximate or remote.

ARBITRATORS—JUDGMENT—CONCLUSIVENESS OF.—The decision of arbitrators, acting within the scope of their authority, upon matters of fact and law, is conclusive and final, as between the parties to that case, until annulled or reversed on appeal.

SUBMISSION to arbitration under a rule of court. The submission was signed by both parties, and therein it was agreed that the award should bind both parties. The award was signed by all three of the arbitrators. Appellant, Curtis, one of the parties, remonstrated against the acceptance of the award. Castle, the other party, demurred to the allegations of the remonstrance. The court sustained the demurrer, overruled the remonstrance, accepted the award, and rendered judgment accordingly. Curtis appealed.

Allan W. Paige and George P. Carroll, for the appellant.

Alfred B. Beers, for the appellee.

500 **ANDREWS, C. J.** Section 1203 of the General Statutes provides that when any persons have submitted any controversy existing between them to the arbitrament of certain persons by them named, on their desiring such submission to be made a rule of court, the same may be entered of record, and a rule made that the parties shall submit to and be finally bound by such arbitration. And it is further provided, that “the award of the arbitrators being returned to

and accepted by the court, judgment shall be rendered thereon for ⁵¹⁰ the party in whose favor the award is made, to recover the sum awarded to be paid to him, with costs; and execution shall be granted," etc.

The acceptance of an award by the court to which it is returned, in order that it may become the basis of a judgment, undoubtedly requires an exercise of the judicial will of the court in its favor. To accept means to receive with approval, to adopt, to agree to. Unless the award does receive such favorable action from the court no judgment upon it can be rendered, and no execution can issue. In cases where there is no objection such favorable action would be given almost as a matter of course. The duty imposed on a court in the acceptance of the award of arbitrators is closely similar to the duty in the acceptance of the report of a committee, or of an auditor, or of a referee. The same word is used by the statutes, and the duties imposed must be substantially the same. That arbitrators are not officers of the court as are committees does not change the power or the duty of the court in this respect. The purpose of the acceptance in either case is the same—to establish the award in the one case and the report in the other, as the judgment of the court. In most of the cases where courts are authorized to accept the report of a committee, or other like board, the power is expressly given to reject it for cause, as in the case of a highway committee: Gen. Stats., sec. 2715. But the power to accept would seem to carry with it the power to refuse to accept. The former implies the latter: *In re Clinton Oyster Ground Committee*, 52 Conn. 8; *Stebbins v. Waterhouse*, 58 Conn. 370. "Where a submission is made by rule of court, it is competent for the party aggrieved by it when it is returned to court, and before acceptance, to impeach it, not only for apparent defects, but extrinsic causes. In the case of defects apparent on the award he can only question it before the acceptance; but if he should not object to it for extrinsic causes before acceptance, especially if he had no knowledge of their existence, he may, after acceptance, file his bill in equity to be relieved against it, on the same ground as where the submission is not by rule of court": ⁵¹¹ 1 Swift's Digest, top p. 480. The rule so stated has been followed in this state for many years: *Parker v. Avery*, Kirby, 353; *Lewis v. Wildman*, 1 Day, 153; *Halsey v. Fan-*

ning, 2 Root, 101; *Belton v. Halsey*, 1 Root, 221; *Bray v. English*, 1 Conn. 498; *Fisher v. Towner*, 14 Conn. 26.

This rule requires that for defects apparent on the award the parties can obtain relief only before the acceptance, unless they are such as absolutely to deprive the court of jurisdiction. But for extrinsic causes it permitted a party to obtain relief after the acceptance. As, since the Practice Act, parties are enabled to obtain equitable and legal relief in the same action, there is no reason why a party who seeks to impeach an award for any cause, whether it be apparent on the award or not, should not do so by way of remonstrance to the acceptance. We think this is the better practice and the one which now ought to be followed.

Arbitration is an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to the established tribunals of justice; and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation. When the submission is made a rule of court the arbitrators are not officers of the court, but are the appointees of the parties, as in cases where there is no rule of court. In either case the submission names the disputed matter upon which the arbitrators are to adjudge, and often prescribes the principles according to which they are to proceed, and the rules they are to follow in their decision. The submission in the present case does this in an ample manner. It provides that the arbitrators "shall proceed upon the principle of equity, in hearing the matters in dispute and making their award, it being the desire of both parties that the matters in dispute between them shall be equitably settled and adjusted so each may have all that is equitably due to him from the other." Counsel for the appellant, in their brief, speak of this designation of the authority given to the arbitrators as a limitation. We do not so read it. To us it seems rather a liberal and highly creditable grant of power. In hearing ⁵¹² the matter committed to them, and in making their award, the arbitrators are commanded to act upon the principles of equity to the end that each of the parties may have from the other all that he is equitably entitled to. This is not equity in any narrow or limited meaning. It is equity in its broadest and most generous sense. It means good conscience, fair dealing, justice. It is in the spirit of the precept "to live honestly, to injure no man, and to render to every man his due." It

is the golden rule, to do by others as we would that others should do by us. It is in the light of this direction to the arbitrators that we are to inquire whether their award should have been set aside for any of the reasons alleged in the remonstrance.

It is to be observed that in the remonstrance the appellant does not charge any willful or intentional misconduct to the arbitrators—nothing in the nature of fraud, or corruption, or of partiality. He seems rather to have studiously avoided any such charge. He asks the court not to accept the award for the reasons stated “in respect to which said arbitrators erred and acted improperly in a legal sense.” The reasons of remonstrance are not entirely harmonious. In some respects, indeed, they are inconsistent. And they do not admit of any very accurate classification. But in a general way they may all be brought into these three classes: 1. That the arbitrators did not make, and refused to make, a finding of the facts on which they based their judgment. If within the term “finding of facts” is included a statement of the amounts found due on each of the several claims of the parties, then to this class may be referred the first, second, third, fourth, fifth, sixth, seventh, tenth, and eleventh reasons of the remonstrance; 2. That the arbitrators erred in admitting parol testimony to vary a writing. To this class may be referred the eighth, ninth, twelfth, thirteenth, and fifteenth reasons; 3. That the majority of the arbitrators did not consult with the minority in coming to their conclusion as to some parts of the award. Under this head fall the sixteenth⁵¹⁸ and seventeenth reasons. The fourteenth reason does not come into either of these classes.

There is no rule of law that requires arbitrators to make a finding of facts in the case on which they decide; nor does the submission in this case require them to do so. It seems to indicate the contrary. It directs the arbitrators to award to either party the amount that shall be found due to him in excess of the amount that shall be found owing from him; not the several sums due to or owing from each on the separate claims. The court certainly ought not to hold that the arbitrators had acted improperly in a legal sense, and refuse to accept their award, if nothing more was charged against them than that they had omitted some detail which neither the law nor the submission had made it their duty to observe. The award must of course contain that actual decision of the

arbitrators which is the result of their consideration of the various matters submitted to them. But it need contain nothing else. The means by which they have come to this conclusion, the reasoning or the principles on which they base it, are, unless the submission otherwise requires, needless and superfluous: Morse on Arbitration and Award, 266.

The largest claim, measured by the amount of money, that existed between these parties, was the one made by Castle against Curtis for damages, because, as Castle insisted, Curtis had not worked certain new streets, just laid out in Bridgeport, in the manner he had agreed to work them. There was a written contract between them. The controversy turned on the meaning to be given to the expression "to work a street," as used in that contract. Curtis claimed that it was a business or a trade term, and that the arbitrators should take judicial notice of its meaning; or, if they were not able to do so, that only expert testimony was admissible to inform them of its meaning. Castle, on the other hand, claimed that the expression was not a trade or business term, but was an expression used by them in the contract with a special meaning, perfectly understood by the parties, and agreed upon by them at the time the contract ^{§14} was made; and offered parol testimony of what that special meaning was. To this Curtis objected, but the arbitrators admitted it.

We understand that there are cases in which parol testimony is admissible to show the contemporaneous understanding of the parties to a contract of the meaning of the terms used by them in the contract. Thus, in *Thorington v. Smith*, 8 Wall. 1, it was held competent to show that the parties to a written contract by the word "dollars" intended Confederate dollars and not lawful dollars of the United States. This decision was applied and extended in *The Confederate Note case*, 19 Wall. 548. In *Excelsior Needle Co. v. Smith*, 61 Conn. 56-64, it is clearly implied that if the term "needle business" had been used in a special sense by the parties in their contract, such sense might have been shown by parol. In *Macdonald v. Longbottom*, 1 El. & E. 978, the defendant by a written contract had purchased of the plaintiffs, who were farmers, a quantity of wool which was described in the contract simply as "your wool." Some time previously a conversation had taken place in which the plaintiffs stated that they had a quantity of wool, consisting partly of their own clip and partly of wool they had contracted to buy of other

farmers. In an action for not accepting the wool this conversation was held admissible in evidence for the purpose of explaining what the parties meant by the term "your wool." In *Shore v. Wilson*, 9 Clarke & F. 566, Chief Justice Tindal, in giving the opinion, says: "The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common ⁵¹⁵ sense agree that by no other means can the language of the instrument be made to speak the real mind of the party": See, also, *Hotchkiss v. Barnes*, 34 Conn. 27; 91 Am. Dec. 713; *Avery v. Stewart*, 2 Conn. 69; 7 Am. Dec. 240. Cases of this kind are analogous to latent ambiguities. But they are something more than such ambiguities. In these cases the parol testimony is used not only to explain the surrounding circumstances, but also to enable the court to look in upon the mind of the contracting parties, and to read the written words of their contract in that very sense in which they wrote them.

In the sixteenth and seventeenth reasons of remonstrance it is alleged that a majority of the arbitrators did not consult with the minority in coming to some of the conclusions reached. If these reasons are compared with the eighth, the eleventh, the twelfth, and the fifteenth reasons, to all of which reference is made in one or both of them, and with the award which is signed by all three of the arbitrators, it will appear not only that the majority did consult with the minority, but that the minority had a large share of success in shaping the award.

The fourteenth reason avers only that the arbitrators held certain damages claimed by Castle as not too remote. This was a matter clearly within their province to decide.

In considering all these reasons of remonstrance we have not failed to be impressed with the fact that the real grounds of objection are several times repeated, with changed circumstances and with varying language, and that they are urged

with a minute and technical insistence which differs widely from the confident and liberal tone used by the parties when they committed the controversy to their own chosen tribunal. If we have not given attention to all of them, and in detail, it is because we think that so far as they are not answered by what we have said they fall clearly within the authority conferred by the submission on the arbitrators, and that the decision of the arbitrators is final.

None of the reasons of the remonstrance assert that the award is not within the submission. It is not pretended that the arbitrators failed to act on all the claims submitted to ⁵¹⁶ them, or that they undertook to act on any matter not submitted. The uniform rule of decision has been in this state that in such cases a court of equity will not set aside an award except for partiality and corruption in the arbitrators, mistakes on their own principles, or fraud or misbehavior in the parties: *Allen v. Ranney*, 1 Conn. 569; *Brown v. Green*, 7 Conn. 536; *Fisher v. Towner*, 14 Conn. 30; *Bridgeport v. Eisenman*, 47 Conn. 37.

"In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. As incident to the decision of the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to evidence, and the inferences of fact to be drawn from it. So, when not limited by the terms of the submission, they have authority to decide questions of law necessary to the decision of the matter submitted, because they are judges of the parties own choosing. Their decision upon matters of fact and law, thus acting within the scope of their authority, is conclusive, upon the same principle that a final judgment of a court of last resort is conclusive; which is, that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judicata*; it is the final judgment for that case and between those parties. It is amongst the rudiments of the law that a party cannot, when a judgment is relied on to support or to bar an action, avoid the effect of it by proving, even if he could prove to perfect demonstration, that there was a mistake of the facts or of the law. . . . But when parties have, expressly or by reasonable implication, submitted the questions of law, as well as the questions of fact, arising out of the matter of

controversy, the decision of the arbitrators on both subjects is final. It is upon the principle of *res judicata*, on the ground that the matter has been adjudged by a tribunal which the parties have agreed to make final, and a tribunal of last resort for that controversy; and therefore it would be as contrary to principle for a court of law or equity to rejudge⁶¹⁷ the same question as for an inferior court to rejudge the decisions of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction or a revising power acting directly upon the judgment alleged to be erroneous": Shaw, C. J., in *Boston Water Power Co. v. Gray*, 6 Met. 165, 166.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

AWARDS—RELIEF FROM IN EQUITY.—Awards will be set aside in equity for fraud, mistake, or accident: *Muldrow v. Norris*, 2 Cal. 74; 56 Am. Dec. 313, and note; *Hartup v. Pittsburgh*, 131 Pa. St. 535; *Herndon v. Imperial etc. Ins. Co.*, 110 N. C. 279; *Brush v. Fisher*, 70 Mich. 469; 14 Am. St. Rep. 510, and note; *James v. Sterrett*, 137 Pa. St. 234. See the notes to the following cases: *Jackson v. Roane*, 35 Am. St. Rep. 242; *Morville v. American Tract Society*, 25 Am. Rep. 46; *Elmendorf v. Harris*, 35 Am. Dec. 594, and *Jocelyn v. Donnel*, 14 Am. Dec. 754.

AWARDS—HOW IMPEACHED.—There are two modes of taking an exception to an award; one, by what appears on the face of the award itself, as when it does not comply with the requisites of law for constituting a good award; the second may be for matters extraneous to the award, as for misbehavior of the arbitrators: *Blackledge v. Simpson*, 2 Hayw. 30; 2 Am. Dec. 614; *Alken v. Bolan*, 1 Brev. 239; 2 Am. Dec. 660, and note; *Pleasants v. Ross*, 1 Wash. 156; 1 Am. Dec. 449, and note.

ARBITRATORS.—GRANT OF POWER TO: See the extended note to *Elmendorf v. Harris*, 35 Am. Dec. 591.

ARBITRATION—NECESSITY FOR FINDINGS.—Arbitrators must pass on all that was particularly referred to them, but their award need not specify each particular; it is sufficient if the general result shows that every matter referred must have been considered and decided: *Blackledge v. Simpson*, 2 Hayw. 30; 2 Am. Dec. 614.

AWARDS—CONCLUSIVENESS OF.—An award is in the nature of a judgment, from the obligation of which nothing can release the defendant but payment or discharge: *Hynes v. Wright*, 62 Conn. 323; 36 Am. St. Rep. 344, and note. The award of a commission is final as to the matters within the scope of its authority: *Hewitt v. Craig*, 86 Ky. 23; *Thornton v. McCormick*, 75 Iowa, 285. An award made upon an arbitration and performed constitutes a good plea in bar of a subsequent action: *Cheatham v. Rowland*, 105 N. C. 218. An award, when made a judgment of the court, is final and conclusive between the parties: *Reizenstein v. Hahn*, 107 N. C. 156.

PINNEY v. JONES.

[64 CONNECTICUT, 545.]

EVIDENCE—DECLARATIONS.—Exceptions to the general rule of evidence which excludes statements made by a party in his own favor ought not to be extended.

RES GESTÆ—DEFINITION.—*Res gestæ* are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character.

DECLARATIONS—RES GESTÆ.—A declaration made by a party in his own favor is not admissible in evidence as part of the *res gestæ*, except where the act characterized or explained by such declaration is admissible.

DECLARATIONS—COMPETENCY—RES GESTÆ.—Where the act characterized or explained by the declaration of a party, and made in his own favor, is not admissible in evidence, its actual admission, without objection, does not render the accompanying declaration competent.

V. Munger, for the appellants.

William H. Williams, for the appellee.

546 TORRANCE, J. This is an action brought to foreclose a mortgage made to secure a note for sixteen hundred dollars by the defendant, Emily Jones, to Charles H. Pinney, now deceased.

The defendant claimed to have paid upon said note to Pinney during his lifetime the sum of fifteen hundred dollars, **547** and whether this was true or not was the main fact in dispute between the parties.

The case was tried before the Hon. Elisha Carpenter as state referee.

For the purpose of showing her ability to make such payment, the defendant offered evidence to prove, and claimed she had proved, that at the time when she bought the mortgaged premises in March, 1892, she had in her possession the sum of fifteen hundred dollars, in addition to the sum of five hundred dollars which she had paid on account of said purchase; that this sum of fifteen hundred dollars was in a package in her house; that she moved into the house upon the mortgaged premises in April, 1892, and two or three weeks thereafter, in the presence of her daughter Cora, who was produced as a witness, she counted said fifteen hundred dollars, and, after counting the same, deducted fifteen dollars therefrom, and placed the remainder in a tin box, and placed the box, with the money in it, in a jar, and sealed up the jar with putty; and that, after leaving the jar upon a shelf to dry for two or three days, she and her husband, who

was produced as a witness, buried this jar in the cellar near the bottom of the stairs, covered it over and placed a paint-barrel over the spot where the jar was buried.

While Mrs. Jones was upon the witness-stand her counsel offered to prove by her that, some time within two months after the money had been counted as aforesaid, Mrs. Jones requested her daughter Cora to go with her to the said place where the money was then buried, and that thereupon Cora and she went to the spot from the sitting-room above; that Mrs. Jones then and there removed the paint-barrel and told Cora that the money was in a pot in the ground, and that she wanted her to know where it was, "for if she should die she wanted her to know about it."

The finding states: "It was not claimed that the earth was removed from over the jar in which the money was claimed to have been placed, or that the jar or other thing in which it is now claimed the money then was was so exposed or attempted to be exposed to view. The plaintiff's ⁵⁴⁸ counsel objected to the admission in evidence of the conversation between the said Emily Jones and her daughter Cora upon this occasion, and it was excluded, to which ruling the defendant duly excepted."

Mrs. Jones thereafter, upon this point, testified without objection as follows: "Cora went with me down cellar; went down the cellar steps to the left hand of the stairs just as you go down. I showed her the money; I took the paint-barrel and moved it around like this [illustrating], and pointed out to her where the money was concealed; then I set the barrel back on the same spot I had removed it from; then we went upstairs; that she, Cora, was the only person, so far as she knew, besides her husband that ever knew or was shown where the money was."

The daughter Cora also testified without objection, to her going down in the cellar with her mother and being shown where the money was concealed, substantially as her mother had done.

The referee found that said claimed payment of fifteen hundred dollars had not been made.

To the report made by the referee the defendant filed a remonstrance, setting up as the ground of it the action of the referee in excluding the conversation aforesaid between Cora and her mother. He further set up therein that the plaintiff claimed that Mrs. Jones did not have said sum of fifteen

hundred dollars at any time after 1891, and that her entire story with reference to the possession of said sum was false. The plaintiff demurred to the remonstrance, the court sustained the demurrer, judgment was rendered for the plaintiff, and the defendant appealed.

This appeal presents but a single question, and that is whether the statement made by Mrs. Jones to her daughter was admissible. It is apparent that the defendant obtained the benefit of every thing else claimed by her except this statement. She was allowed to testify fully as to her acts and conduct in going into the cellar and pointing out the place where she claimed the money was concealed, and from all this Cora understood that the money was there buried. She ⁵⁴⁹ says indeed that she there showed Cora the money, but from her own testimony and from other parts of the record it is clear that all she meant by this was that she showed her the place where the money was concealed. Essentially, then, in this view of the matter, all that was excluded was her statement of her reason for having Cora know where the money was concealed; and it is perhaps questionable whether, even on the defendant's view of the case, the exclusion of that was error: *Russell v. Frisbie*, 19 Conn. 205-211. And if it was, the case might perhaps be disposed of on the ground that the error did not harm the defendant. But, as we think the evidence was rightly excluded, we prefer to rest the decision upon that ground rather than upon the one suggested.

As we have said, what was done in the cellar was, without objection, fully testified to by both Mrs. Jones and Cora. What was said was excluded; and that was, in substance, a statement by Mrs. Jones that the money was buried there in a jar, and that she wanted to have Cora know, for a reason then stated, where it lay. The defendant strenuously insisted that this statement characterized the act of Mrs. Jones in going to the cellar and doing what she did there, and was admissible in corroboration of her claim to the possession of the money, and as part of the *res gestæ*; and in support of these claims he relies mainly upon the case of *Card v. Foot*, 56 Conn. 369; 7 Am. St. Rep. 311.

The general rule is, that a party cannot give in evidence his own declarations in his own favor, made in the absence of the other party; but there is one well-recognized exception to this rule, where such declaration is part of, what for want of a better name, is called the *res gestæ*: *Kilburn v. Ben-*

nett, 3 Met. 199; *Stirling v. Buckingham*, 46 Conn. 461. The nature and limits of this exception are tolerably well defined, although the application of the rule embodied in the exception, in particular cases, is some times attended with difficulty. That rule is thus stated in Starkie on Evidence, 10th edition, 466-687: "In the first place, an entry or declaration accompanying an act seems, on principles already announced, to be admissible evidence in all cases where a ⁵⁵⁰ question arises as to the nature or quality of that act. Indeed, whenever an entry or declaration reflects light upon, or qualifies, an act which is relevant to the matter in issue and is evidence in itself, it becomes admissible as part of the *res gestæ*, if it be contemporaneous with the act."

According to this writer, before a written declaration made by a party in his own favor can be admissible as part of the *res gestæ*, the act which it characterizes and of which it forms a part must be itself admissible in evidence in the case; and so are the authorities. "Where an act done is evidence *per se*, a declaration accompanying that act may well be evidence if it reflects light upon or qualifies the act. But I am not aware of any case where the act done is, in its own nature, irrelevant to the issue, and where the declaration *per se* is inadmissible, in which it has been held that the union of the two has rendered them admissible." Coltman, J., in *Wright v. Tatham*, 7 Ad. & E. 361; *Gresham Hotel Co. v. Manning*, 1 Ir. C. L. 125. "*Res gestæ* are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character": *Stirling v. Buckingham*, 46 Conn. 461. "When the act of a party may be given in evidence his declarations, made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it": *Lund v. Tyngsborough*, 9 Cush. 36.

It follows that if the act of Mrs. Jones, irrespective of the accompanying statement, was not in itself admissible in evidence, then the statement was inadmissible; and the fact that the act was admitted without objection does not make

the accompanying statement legal evidence. The question then is whether what Mrs. Jones did upon the occasion in question was *per se* admissible as evidence in the case, and ⁵⁵¹ we are clearly of the opinion that it was not. It was offered and received as an act tending to show that she then had this money in her possession; but rightly considered it was not in any proper sense, within the meaning of the rule in question, an act or transaction at all. It is true there were the physical acts of going downstairs, and over to where it was supposed the money was buried, and the moving of the paint-barrel, and the pointing to or otherwise indicating a certain spot of earth, but that was all. There is nothing in all this tending in the least to show that the money, or the receptacle which had contained it, were then in the spot pointed out. For aught that appears all that Mrs. Jones could then know or say about the money was—not that it was then there—but that she had put it there some time before, and believed it was there then; and neither she nor Cora then knew, or could know, that the money was then in the possession of Mrs. Jones, or even in existence at all. Nothing whatever was done by either of them with, or with reference to, the money or the jar; they were not seen, handled, nor dealt with in any manner whatsoever. Essentially, the so-called act or acts of Mrs. Jones are but statements or declarations that she had buried the money there some time before, and believed it was there then.

Suppose Mrs. Jones and her daughter had remained upstairs, and Mrs. Jones had said to Cora: "I put the money you saw me count the other day into a tin box and the box into a jar, and buried the jar in the cellar to the left hand of the stairs just as you go down, and put a paint-barrel over the spot where they now are; I tell you this so that in case of my death you will know where to find the money"—could any one successfully contend that such a statement was admissible? Clearly not. It would be a mere naked statement or declaration of a past transaction in the party's own favor, and would clearly fall within the general rule of exclusion. But the supposed case does not differ essentially from the real case; for in the one Mrs. Jones indicates and describes the place where she buried the money by words, and in the other she indicates and describes it by acts; and ⁵⁵² the result of both is but a statement or declaration to Cora that the money had been buried there, and that Mrs. Jones believed it was

there at that time. That in the one case this information is conveyed to Cora by words, and in the other by acts, can make no difference; in both the result is only and solely information conveyed.

The difference between an act of the kind here claimed, and the acts done in *Russell v. Frisbie*, 19 Conn. 205, and *Card v. Foot*, 56 Conn. 369, 7 Am. St. Rep. 311, is quite obvious. In the former case the defendant was allowed to prove what he said to one Hempstead, when he handed to him for safekeeping the ship's papers, which defendant had taken from a vessel of his in order to revoke the authority of her captain; in the latter the plaintiff was allowed to prove what she said to Miss Lyon when she delivered to her for safekeeping the package containing the plaintiff's bonds. In both of these cases the declarations allowed accompanied, grew out of, formed part of, and of course qualified and characterized, acts which themselves were clearly admissible to prove the then possession and disposition of the ship's papers in the one case and the bonds in the other. The acts were not in effect mere declarations, but acts of possession and disposition in a real and true sense.

In the case at bar this is not so. There the so-called act is itself, in effect, but a statement or declaration. Nothing was transacted, nothing was done, nothing was transpiring, evident to any witness, which could confirm the declarations excluded, or by which upon cross-examination, or otherwise, the truth of those declarations could be tested. "Declarations accompanying acts are a wide field of evidence, and to be carefully watched," said Williams, J., in *Queen v. Bliss*, 7 Ad. & E. 556, a good many years ago; and we think this "field" should still be carefully watched.

The exceptions to the general rule excluding statements made by one in his own favor ought to be strictly limited; certainly the scope of the exception in question ought not to be extended to a case like the one at bar. For the reasons given the claimed act or acts of Mrs. Jones were not ⁵⁵² admissible, and should, and on objection probably would, have been excluded. They were, however, admitted, and of this the defendant does not, and cannot, justly complain; but, on objection, the statement accompanying the claimed act was excluded, and we think was rightfully excluded.

There is no error.

In this opinion the other judges concurred.

EVIDENCE—DECLARATIONS IN PARTY'S FAVOR.—Self-serving declarations are incompetent as a general rule: *Tobin v. Young*, 124 Ind. 507; *Walker v. Steele*, 121 Ind. 436; *Wallace v. Berry*, 83 Tex. 328; *Porter v. Metcalf*, 84 Tex. 468; *Herndon v. Davenport*, 75 Tex. 462. A party's declarations are not admissible in his favor, though accompanied by acts in harmony therewith: *Hunt v. Roylance*, 11 Cush. 117; 59 Am. Dec. 140, and note; *Tucker v. Frederick*, 28 Mo. 574; 75 Am. Dec. 139. A plaintiff's narrative declarations of past events are inadmissible as evidence in his favor, though made to his attending physician: *Emerson v. Lowell Gas Light Co.*, 6 Allen, 146; 63 Am. Dec. 621.

EVIDENCE—SELF-SERVING DECLARATIONS—RES GESTÆ—WHEN ADMISSIBLE AS.—Declarations of a party are admissible as evidence in his favor when part of the *res gestæ*, or where such declarations are necessary to explain an act which takes its character from the design of the party who does it: *Baker v. Kelly*, 41 Miss. 696; 93 Am. Dec. 274, and extended note. Declarations of a party are admissible as part of the *res gestæ* if made at the time to an act done by him, and explanatory thereof, where evidence of such act is admissible: *Wetmore v. Mell*, 1 Ohio St. 26; 59 Am. Dec. 607, and note. Declarations by a party in possession of personal property as to ownership thereof, accompanying some principal fact which they serve to explain, are sometimes said to be a part of the *res gestæ*, and, with the proper restrictions, may, in certain cases, be permitted to go in evidence: *Reiley v. Haynes*, 38 Kan. 259; 5 Am. St. Rep. 737.

EVIDENCE—RES GESTÆ.—DEFINITION: See the notes to *Lewis v. State*, 26 Am. St. Rep. 723; *Chattanooga etc. R. R. Co. v. Liddell*, 21 Am. St. Rep. 178; *Hinchcliffe v. Koontz*, 16 Am. St. Rep. 407; *Texas etc. Ry. Co. v. Robertson*, 27 Am. St. Rep. 935, and *International etc. Ry. Co. v. Anderson*, 27 Am. St. Rep. 907.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

CITY OF BLOOMINGTON v. LEGG.

[151 ILLINOIS, 9.]

NEGLIGENCE—EVIDENCE OF OTHER ACCIDENTS.—In an action to recover for injury caused by negligence, evidence that other accidents have occurred of a similar character to that which resulted in the injury in question is competent, not for the purpose of showing independent acts of negligence, but as tending to prove that the common cause of the accidents is a dangerous, unsafe thing.

NEGLIGENCE—EVIDENCE.—When issue is made as to the safety of any machinery or work of man's construction which is of practical use the manner in which it has served that purpose, when put to that use, is matter material to the issue, and ordinary experience of that practical use, and the effect thereof bear directly upon such issue. Evidence thereof is always competent.

NEGLIGENCE—EVIDENCE OF OTHER ACCIDENTS.—In an action to recover for injury resulting from negligence, evidence of similar accidents resulting from the same cause is competent to show a dangerous condition, and as tending to show notice. The frequency of such accidents creates a presumption of knowledge, and is material to the question of diligence used to obviate the cause of injury.

NEGLIGENCE—EVIDENCE OF OTHER ACCIDENTS.—To render evidence of similar accidents, resulting from the same cause, competent in an action to recover for injury resulting from negligence, it must appear, or the evidence must reasonably tend to show, that the instrument or agency which caused the injury was in substantially the same condition at the time such other accidents occurred as at the time the accident complained of was caused.

NEGLIGENCE.—EVIDENCE OF PRECAUTION TAKEN AFTER AN ACCIDENT is not admissible to show negligence.

ACTION to recover for negligence resulting in death. It was alleged that the city of Bloomington erected and maintained within its limits a fountain used for drinking purposes

and for watering horses; that around such fountain was a basin into which water was conducted by two spouts projecting out several inches over the basin, so that horses, when drinking, or afterwards, were liable, in lifting their heads, to catch or break their bridles, and that the city had notice of these facts. Silas M. Legg, on September 10, 1889, while exercising due care and diligence for his own safety, and while driving a team of horses attached to a wagon on which he was riding, allowed his horses to drink from the basin of the fountain. The bridle of one of the horses caught on one of the spouts, and the horses ran away, throwing him from the wagon, which passed over and killed him. Judgment for plaintiff, and defendant appealed.

T. C. Kerrick, S. Welty, and J. P. Lindley, city attorney, for the appellant.

J. S. Ewing and J. T. Jillard, for the appellee.

12 PHILLIPS, J. The declaration contained several counts, some of which alleged that the spouts of the fountain turned downward at an angle at the end, whilst other counts charged the spouts as projecting straight out.

Evidence was admitted, over the defendant's objection, that other accidents had occurred of a similar character to that which resulted in injury to the deceased. Evidence of other accidents occurring from the same cause is by many courts held incompetent.

This court has held such evidence competent, not for the purpose of showing independent acts of negligence, but as tending to show the common cause of these accidents is a dangerous, unsafe thing. Where an issue is made as to the safety of any machinery or work of man's construction which is for practical use, the manner in which it has served that purpose, when put to that use, would be a matter material to the issue, and ordinary experience of that practical use, and the effect of such use, bear directly upon such issue. It no more presents a collateral issue than any other evidence that calls for a reply which bears on the main issue. Such evidence is held competent by the weight of authority: *Ottawa Gas Light & Coke Co. v. Graham*, 35 Ill. 346; *City of Chicago v. Powers*, 42 Ill. 170; 89 Am. Dec. 418; *City of Fort Wayne v. Coombs*, 107 Ind. 75; 57 Am. Rep. 82; *City of Topeka v. Sherwood*, 39 Kan. 690; *District of Columbia v. Armes*, 107 U. S. 519; *Darling v. Westmoreland*, 52 N. H. 401; 13 Am.

Rep. 55. The same rule is adopted in Georgia, ¹⁴ Alabama, Connecticut, Minnesota, Michigan, and other states. In addition to being evidence material to the issue to show a dangerous condition, it is also evidence material as tending to show notice: *City of Chicago v. Powers*, 42 Ill. 170; 89 Am. Dec. 418. The frequency of such accidents would create a presumption of knowledge, and would be material to the question of diligence used to obviate the cause of injury.

The further point is made that plaintiff was permitted to show, over the objection of defendant, that other accidents occurred on account of the fountain spouts, when they were not in the same condition as they were at the time of injury to the deceased. The rule is clear that to render evidence of similar accidents, resulting from the same cause, competent, it must appear, or the evidence must reasonably tend to show that the instrument or agency which caused the injury was in substantially the same condition at the time such other accidents occurred as at the time the accident complained of was caused. The fountain spouts, when the fountain was first erected, projected two or three inches from the standard, and an elbow was screwed on to the outer end, which, in position, was perpendicular to the end of the spout, and projected downward. That elbow was removed, and that was the changed condition. It is not possible for a trial court to know the fact to be testified to by a particular witness, and whenever a witness was inquired of as to other accidents, the court, when the question was objected to, ruled in the presence of the jury that such evidence, if there were changed conditions, could not be considered to the prejudice of the city. And on the trial the court instructed the jury that they were not "to consider any testimony regarding accidents or trouble with horses, occurring at the fountain in question, at a time or times when you believe from the evidence the spouts complained of were in a materially different condition from ¹⁵ what they were at the time of the injury complained of in this case."

Considering the instruction, and what was said by the court in ruling on the objection, we are not disposed to hold there was such error in the admission of that evidence that this judgment should be reversed. It is insisted that the court erred in allowing proof that the spouts were entirely removed after the injury to deceased. "Evidence of precaution taken after an accident is apt to be interpreted by a jury

as an admission of negligence": *Hodges v. Percival*, 132 Ill. 53.

Such evidence is not admissible; but it appears that the answer made by the witness was on cross-examination, and in response to a question asked by appellant's counsel, to which counsel asking the question objected, and the objection was overruled; on re-examination counsel for plaintiff inquired of the witness as to the same matter, to which counsel for appellant objected; no exception, however, was preserved in the record to any of the rulings of the court on these objections; there is, therefore, nothing for this court to review on that question.

We have carefully considered the objections made to the second and seventh instructions given for plaintiff, and are of opinion that they are not subject to the criticism made, and concur with the view expressed by the appellate court with reference to those instructions. We are of opinion that there is no reversible error in this record, and the judgment of the appellate court is affirmed.

NEGLIGENCE—EVIDENCE OF OTHER ACCIDENTS.—Evidence of other similar occurrences on other occasions is not admissible for the purpose of raising a presumption that the accident in question happened, or that the place was dangerous or defective, or that the situation was of such a character that the occurrence resulting in the injury complained of might well have taken place: *Cleveland etc. Ry. Co. v. Wynant*, 114 Ind. 525; 5 Am. St. Rep. 644. In an action for injuries resulting from an alleged defect in a highway, where the question at issue is whether the defect rendered the highway unsafe for travelers, evidence that other persons received injuries from the same defect is inadmissible: *Bremner v. Inhabitants*, 83 Me. 415; 23 Am. St. Rep. 782, and note. To the same effect, see *Mathews v. Cedar Rapids*, 80 Iowa, 459; 20 Am. St. Rep. 436, and note; *Phillips v. Town of Willow*, 70 Wis. 6; 5 Am. St. Rep. 114, and note. That evidence of previous accidents of a similar nature is not admissible in an action against a railroad company for negligence, see the note to *Louisville etc. R. R. Co. v. Berry*, 21 Am. St. Rep. 332.

NEGLIGENCE—EVIDENCE OF PRECAUTIONS TAKEN SUBSEQUENT TO ACCIDENT.—Evidence that the defendant in an action to recover damages for personal injuries has adopted, since the occurrence of the accident, certain precautions calculated to prevent a repetition thereof, is not admissible: *Standard Oil Co. Tierney*, 92 Ky. 367; 36 Am. St. Rep. 595, and note; *Shimmers v. Proprietors*, 154 Mass. 168; 26 Am. St. Rep. 226, and note. *Contra*, see *St. Louis etc. Ry. Co. v. Weaver*, 35 Kan. 412; 59 Am. Rep. 176, and extended note.

FLETCHER v. TUTTLE.

[151 ILLINOIS, 41.]

EQUITY JURISDICTION—PROTECTION OF POLITICAL RIGHTS.—A court of equity has no jurisdiction to protect and enforce the right of a voter to cast his ballot in a legal and effective manner, or his right to be a candidate for a particular elective office, or to have an election called and held under the provisions of a valid law, or to have his name printed upon the ballots to be used at such election, so that he may be voted for in a legal manner. Such rights are purely political, and must be asserted in a court of law.

EQUITY JURISDICTION—PROTECTION OF POLITICAL RIGHTS.—Wherever established distinctions between equitable and common-law jurisdiction are observed courts of equity have no authority to interpose for the protection of rights merely political, and when no civil or property rights are involved. In such cases the remedy must be sought in a court of law.

EQUITY JURISDICTION—PROTECTION OF POLITICAL RIGHTS.—The jurisdiction of a court of chancery cannot be invoked to protect the right of a citizen to vote, or to be voted for at an election, or his right to be a candidate for, or to be elected to, any office, or to restrain the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. Such matters involve no property rights, but pertain solely to the political administration of government. Therefore the remedy must be sought in courts of law.

EQUITY JURISDICTION—PROTECTION OF POLITICAL RIGHTS.—If a public officer charged with political administration has disobeyed, or threatens to disobey, the mandate of the law, whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in his political rights is not without remedy. But the remedy must be sought in a court of law, and not in chancery.

REMEDIES—MANDAMUS AND INJUNCTION NOT CORRELATIVE.—Wherever established distinctions between equity and common-law jurisdiction are observed, injunction and *mandamus* are not correlative remedies, in the sense of being applicable to the same subject matter, the choice of the writ to be resorted to in a particular case depends upon whether there is an excess of action to be restrained or a defect to be supplied. Injunction is proper only in cases of equitable jurisdiction, while *mandamus* is applicable only in cases coming within the appropriate jurisdiction of courts of common law.

ELECTIONS.—INJUNCTION DOES NOT LIE to restrain the holding of an election, or to restrain public officers from incurring the expense incident to holding an election.

G. Hunt, W. J. Calhoun, E. S. Smith, and H. G. Jones, for the appellants.

T. A. Moran, for the appellees.

⁴⁵ **PER CURIAM.** The first of these cases was a bill in chancery, exhibited by James P. Fletcher in the circuit court

of Vermilion county, praying that an act of the general assembly, entitled "An act to apportion the state of Illinois into senatorial districts, and to repeal certain acts therein named," approved June 15, 1893, be declared unconstitutional and void, and that a writ of injunction issue to Walter C. Tuttle, county clerk of Vermilion county, restraining him from issuing, or causing to be posted, notices of election, calling an election for members of the house of representatives for the eighteenth senatorial district; that the injunction be made perpetual, and also a general prayer for relief. Tuttle, the county clerk, was the only party named as defendant.

The complainant, by his bill, professed to prosecute his action for himself, as well as for all the people of the state of Illinois. The averments of his bill are, in substance, that he is, and for more than thirty-nine years has been, a citizen of the county of Vermilion, and is a taxpayer and legal voter in that county; that under the constitution of the state he is entitled to equal representation in the general assembly of the state with each and every other citizen thereof, so far as such equality of representation can be secured by an apportionment of the senatorial districts of the state, for the election of senators and members of the house of representatives in the general assembly, among the several counties in the state; that, by reason of the matters thereafter recited, the petitioner's right of equal or proportionate representation in the general assembly of the state, as well as the like rights of ⁴⁶ every other citizen of the state, as provided by the constitution, has been infringed, violated, and in a large part destroyed, unless through the intervention of the court, as a court of equity, the wrongs complained of shall be prevented.

The bill then alleges that the population of the state, as ascertained by the federal census of 1890, was 3,826,351, and an exhibit is appended to the bill of the census bulletin, showing the population of the state by counties, and of the city of Chicago by wards, according to the census of 1890; that, for the purpose of apportioning the state into senatorial districts, it became and was the duty of the general assembly to divide the population of the state, as ascertained by the federal census, by the number fifty-one, the quotient thereby produced to be the ratio of representation in the state; that it was then and there the duty of the general assembly to divide the state into fifty-one senatorial districts, such districts to be formed of contiguous and compact territory, bounded by county lines,

such districts to contain, as nearly as practicable, an equal number of inhabitants; that when any county contained a population exceeding two full ratios it was entitled to be divided into senatorial districts, equal in number to the number of full senatorial ratios of inhabitants contained in the county, as shown by the census; that the senatorial ratio thus formed was 75,026; that the population of the county of Cook was 1,191,922; that the general assembly, in and by the above-mentioned act, gave and apportioned to the county of Cook fifteen senatorial districts, and to the residue of the state thirty-six.

The bill then specifies and points out a large number of the senatorial districts created by the act, both in the county of Cook and elsewhere in the state, which, as it alleges, are not formed of contiguous and compact territory, as required by the constitution, among them being the eighteenth senatorial district, composed of the counties ⁴⁷ of Vermilion and Ford. It also alleges that the act did not apportion the state into senatorial districts containing, as nearly as practicable, an equal number of inhabitants, but, on the contrary, that many of the districts contain numbers of inhabitants far in excess of the senatorial ratio, and greatly and unnecessarily unequal, when compared with other districts created by the act, and that many of the districts contain numbers of inhabitants greatly below the senatorial ratio, and grossly and unnecessarily unequal, when compared with other districts, and a large number of districts are specified and pointed out, in which it is alleged such gross and unnecessary inequality of population exists.

It is therefore alleged that by reason of the unnecessary and gross inequalities of population among the several districts, and also by reason of the failure to form the several districts of contiguous and compact territory, the apportionment act of 1893 is unconstitutional and void.

The complainant further alleges that he is a candidate for election as a member of the house of representatives, which representatives are to be chosen at a general election, to be held on the Tuesday next after the first Monday in November, 1894; that he has already been chosen for such candidacy by the voters of his party in Vermilion county, at the primaries already held in that county; that as such candidate he has a special personal interest in the question at issue in this case, and is entitled to prosecute this suit, to

the end that he may be voted for in the district, and throughout the district, of which Vermilion county legally forms a part, and that the legal voters of all the district may have an opportunity to vote for him, and, if chosen by a plurality of the votes cast at such election, that he may be duly declared elected as a member of the house of representatives for such district; that the entire people of the state are interested in the question, to the end that the next general assembly of the state to be chosen may be chosen from districts legally formed, and that its acts may ⁴⁸ not be questioned, by reason of the invalidity of the act of apportionment, and that the people may enjoy the right of representation, as provided by the constitution.

The petitioner further alleges that, under the present system of holding elections, as provided for by the laws of this state, the holding of an election throughout the county of Vermilion necessitates a large expenditure of public moneys, to be paid out of the treasury of the county; that as the apportionment act above referred to is invalid it will entail upon the people and taxpayers of the county a large and unnecessary burden in holding elections for members of the general assembly themselves, and that the amount of public funds thus unnecessarily paid out of the county treasury will exceed fifty dollars, and that the total cost of holding the election in the county will exceed the sum of one thousand dollars.

It is further alleged that Walter C. Tuttle is the county clerk of Vermilion county, and it is made his duty by law, at least thirty days prior to any general election, to make out and deliver to the supervisors of his county three notices for each election precinct or district in their respective townships, Vermilion county being under township organization, which notices are required to specify and give the title of the several offices to be filled at such election, and which notices the supervisors are required to post up in three of the most public places in each election precinct in their respective townships, and such election will be held in pursuance thereof, as provided by law; that, by the law of the state, the county clerk will have charge of printing the ballots for the general election, and it is made his duty to furnish such ballots to the judges of election, and no ballots other than those thus furnished can be used at the election; that, notwithstanding the matters above set forth, the county clerk

threatens and declares his intention to issue the notice of election in his county, for the election of three members of the house of representatives for the eighteenth senatorial district, and to have the ballots for ⁴⁹ the election printed accordingly, so far as the same pertains to the representatives in the general assembly, by means whereof, and by reason of the premises, the legal voters of Vermilion county will be induced to and will cast their votes for members of the general assembly for a district of which Vermilion county does not legally form a part, and no votes can be cast at such election for members of the general assembly for the district of which the county does legally form a part, by means whereof the election of members of the general assembly will be invalid and of no effect; that, unless restrained by the order of the court from issuing or causing to be posted notices of election as above set forth, the county clerk will issue such notices and cause them to be posted, and petitioner will be greatly damaged, and will be deprived of his constitutional right of becoming a candidate for member of the house of representatives in the district of which he is a resident, and of being voted for by the legal voters of that district, and also of the right of voting for candidates for the general assembly for that district; that, by reason of the matters above set forth, the people of the state will be deprived of the right of equal and proportionate representation, as provided and recognized by the constitution of the state.

It is further alleged that if the apportionment act of 1893 is invalid, as the complainant is advised and believes, the legal voters of Vermilion county are entitled to vote for and elect a member of the state senate in the next general assembly; that the county clerk threatens to, and declares it to be his intention to, omit from the election notices any call or notice for the election of a member of the state senate, and to omit from the ballots, which he will cause to be printed for the election in the county, the name of any candidate for the office of senator, so that the legal voters of the county, including the complainant, will ⁵⁰ be deprived of the constitutional right of voting for a candidate for state senator at the November election.

It is also alleged that the general assembly passed another apportionment act, which was approved May 16, 1893, which act was in all respects identical with the act before referred to, except that it omitted from the seventh senatorial district

the town of Riverside, and which act—the act above referred to, and approved June 15, 1893—purports to have repealed; but it is alleged that the act of May 16, 1893, is subject to all the objections above set forth in relation to the act of June 15, 1893, and is, for the same reasons, unconstitutional and void.

The prayer of the bill is, that upon the hearing of the cause both acts be declared unconstitutional and void, and held to be of no effect, and that a writ of injunction issue to Walter C. Tuttle, county clerk of Vermilion county, restraining him from issuing or causing to be posted notices of election, calling an election for members of the house of representatives for the eighteenth senatorial district, and that such injunction be made perpetual, and that the court grant to the petitioner and to the people all such other and further relief as the case demands.

The defendant answered, admitting the allegations of the bill, except that he denied that the complainant's rights were infringed by the matters thus alleged; that the senatorial districts created by the act in question are not compact and contiguous, and that the act is unconstitutional and void, and also excepting that the defendant says that he cannot answer whether the districts are as nearly equal as practicable, and whether the population of some of the districts is unnecessarily greater or less than the given ratio.

A replication was filed, and a hearing was had upon the bill, the admissions made by the answer and the replication, and at such hearing a decree was entered dismissing the bill at complainant's cost for want of equity.

51 In the other case, of which the title is given above, W. C. Blair filed his bill in chancery, in the circuit court of Sangamon county, against William H. Hinrichsen, the secretary of state, alleging that the complainant is a resident of the county of Jefferson, and a legal voter in that county, and qualified to hold the office of member of the general assembly, and is a candidate of his party for that office, in and for the forty-seventh senatorial district, as formed by the apportionment act, approved March 1, 1872, consisting of the counties of Jefferson, Hamilton, and White. His bill attacks the apportionment act of 1893 upon substantially the same grounds alleged in the bill of James P. Fletcher, and also attacks the apportionment act of May 6, 1882, dividing the state into senatorial districts, on similar grounds,

and prays to have both the acts of 1893 and 1882 declared unconstitutional and void.

The bill alleges that the secretary of state declares that it is his intention to certify the names of candidates who are nominated in the various ways now provided by law, as candidates for the general assembly, from the districts as fixed by the apportionment act of 1893, if that act is constitutional, but that if it is held to be unconstitutional he will then certify the names of candidates nominated for the senatorial districts as fixed by the act of 1882, and that he will so act, unless restrained by the court from so doing, and the complainant will be deprived of his right to have his name printed upon the tickets and voted for at the next general election of members of the general assembly; that, if the secretary of state is not enjoined from certifying the names of such candidates, a large amount of money will be expended in and about printing the tickets containing the names of the candidates from districts formed by unconstitutional and void laws; that the public money used in printing such tickets will be wholly wasted, and that the complainant is a citizen and taxpayer of the state.

⁵² The bill prays that both of the apportionment laws of 1893 and the apportionment act of 1882 be each and all declared unconstitutional and void, and that of 1872 be declared in full force, and that the secretary of state be enjoined from certifying the name of any candidate who may be nominated for election to the next general assembly from districts formed under either of the acts of 1893, or under the act of 1882, and that at the hearing the injunction be made perpetual, and also a general prayer for relief.

A general demurrer to this bill was sustained by the court, and, the complainant electing to abide by his bill, a decree was entered dismissing the bill, at the complainant's costs, for want of equity, and the complainant has appealed to this court. The two cases have been consolidated in this court for the purposes of argument, and, as they involve substantially the same legal propositions, they will be considered together.

From the foregoing statement of these two bills it seems to be perfectly plain that the entire scope and object of both is the assertion and protection of political, as contradistinguished from civil, personal, or property rights. In both the complainant is a legal voter, and a candidate for a par-

ticular elective office, and by his bill he is seeking the protection and enforcement of his right to cast his own ballot in a legal and effective manner, and also his right to be such candidate, to have the election called and held under the provisions of a valid law, and to have his name printed upon the ballots to be used at such election so that he may be voted for in a legal manner. The rights thus asserted are all purely political. Nor, so far as this question is concerned, is the matter aided in the least by the attempt made by the complainant in each bill to litigate on behalf of other voters, or of the people of the state generally. The claims thus attempted to be set up are all of the same nature, and are none the less political.

⁵³ As defined by Anderson, a civil right is "a right accorded to every member of a distinct community or nation," while a political right is a "right exercisable in the administration of government": Anderson's Law Dictionary, 905. Says Bouvier: "Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support, or management of the government. They consist in the power of acquiring and enjoying property, or exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by sentence of civil death, is in the enjoyment of his civil rights—which is not the case with political rights; for an alien, for example, has no political, although in full enjoyment of his civil, rights": 2 Bouvier's Law Dictionary, 597.

The question then is whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity. In *Sheridan v. Colvin*, 78 Ill. 237, this court adopting, in substance,

the language of Kerr on Injunctions, said: "It is elementary law that the subject of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal, or ⁵⁴ merely immoral, which do not affect any right of property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of the government, except under special circumstances, and where necessary for the protection of rights of property."

In that case the police commissioners of the city of Chicago filed their bill in chancery against the mayor, the members of the common council, and certain other officers of the city, to restrain the enforcement of a city ordinance reorganizing the police force of the city, and depriving the complainants of their functions as police commissioners, it being claimed that the common council had no power to pass the ordinance, and that it was consequently void. It was held that the rights which were thus sought to be protected and enforced were purely political, and that a court of chancery, therefore, had no jurisdiction to interfere with the passage or enforcement of the ordinance.

In *Dickey v. Reed*, 78 Ill. 261, a bill in chancery was filed by the state's attorney of Cook county and five taxpayers of the city of Chicago, to restrain the members of the common council of the city and the city clerk from canvassing the returns of the election held in the city April 23, 1875, upon the question whether the city would become incorporated under the general incorporation act. It was claimed that the election, for certain reasons, was void, and also that gross frauds had been perpetrated at the election, by depositing a large number of ballots in the ballot-boxes which had not been cast by the voters, and that a large number of illegal and fraudulent votes in favor of organization had been cast, and that various other irregularities, having the effect of invalidating the election, had intervened. A preliminary injunction having been awarded, it was disregarded by the city officers, who proceeded, notwithstanding, to canvass the vote and declare ⁵⁵ the result. Various of the city officers

and their advisers were attached and fined for contempt, and on appeal to this court from the judgment for contempt it was held that the matter presented by the bill was a matter over which a court of chancery had no jurisdiction, and that the injunction was void, so that its violation was not an act which subjected the violators to proceedings for contempt.

In *Harris v. Schryock*, 82 Ill. 119, it was held that the power to hold an election is political and not judicial, and that a court of equity has no jurisdiction to restrain officers from the exercise of such powers. And it was said that this was in accordance with repeated decisions of this court, and, in support of that statement, *People v. City of Galesburg*, 48 Ill. 485, *Walton v. Develing*, 61 Ill. 201, *Darst v. People*, 62 Ill. 306, and *Dickey v. Reed*, 78 Ill. 261, are cited. So, in *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237, it was held that a court of equity has no jurisdiction to entertain a bill to enjoin the mayor and aldermen of a city from removing a party from office and appointing a successor, and from preventing the party from discharging his duties after removal by them, as the party's remedy at law is complete by *quo warranto* against the successor, or by *mandamus* against the mayor and councilmen.

In *State of Georgia v. Stanton*, 6 Wall. 50, a bill was filed by the state of Georgia against the secretary of war and other officers representing the executive authority of the United States, to restrain them in the execution of the acts of Congress known as the reconstruction acts, on the ground that the enforcement of those acts would annul and totally abolish the existing state government of the state, and establish another and different one in its place, and would, in effect, overthrow and destroy the corporate existence of the state, by depriving it of all means and instrumentalities whereby its existence might and otherwise would be maintained; and it was held that the bill ⁵⁶ called for a judgment upon a political question, and that it would not, therefore, be entertained by a court of chancery. And it was further held that the character of the bill was not changed by the fact that, in setting forth the political rights sought to be protected, it averred that the state had real and personal property, such, for example, as public buildings, etc., of the enjoyment of which, by the destruction of its corporate existence, the state would be deprived, such averment not being the substantial ground of the relief sought.

In re Sawyer, 124 U. S. 200, it was held that the circuit court of the United States had no jurisdiction to entertain a bill in equity to restrain the mayor and committee of a city in Nebraska from removing a city officer, upon charges filed against him for misfeasance in office, and that an injunction issued on such bill, as well as an order committing certain persons for contempt in disregarding the injunction, was absolutely void. In that case the court say: "The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such jurisdiction or to sustain a bill in equity to restrain, or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government." In support of its decision the court cites, among various other cases, the decisions of this court in *Delahanty v. Warner*, 75 Ill. 185; 20 Am. Rep. 237; *Sheridan v. Colvin*, 78 Ill. 237, and *Dickey v. Reed*, 78 Ill. 261, above referred to, and quotes with approval the passage in the opinion in *Sheridan v. Colvin*, 78 Ill. 237, above set forth, taken in substance from Kerr on Injunctions.

⁵⁷ Other authorities of similar import might be referred to, but the foregoing are amply sufficient to show that, wherever the established distinctions between equitable and common-law jurisdiction are observed, as they are in this state, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, must be sought in a court of law. The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for, or to be elected to, any office. Nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of government. If a public officer, charged with political ad-

ministration, has disobeyed or threatens to disobey the mandate of the law, whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in his political rights is not without remedy. But his remedy must be sought in a court of law, and not in a court of chancery.

The only decision to which we are referred, in which relief of the character of that sought in this case was given, in what was in substance an equitable proceeding, is *State v. Cunningham*, 83 Wis. 90; 35 Am. St. Rep. 27. That was an original proceeding, brought in the supreme court of Wisconsin, to test the validity of an apportionment law passed by the legislature of that state, dividing the state into legislative districts. An injunction was prayed to restrain the secretary of state from publishing notices of an election of members of the senate and assembly in the legislative districts attempted to be created by the act, and from filing ⁵⁸ and preserving in his office certificates of nomination and nomination papers, and from certifying the same to the several county clerks. The court entertained jurisdiction of the proceeding, and on final hearing awarded a perpetual injunction, as prayed for.

We have carefully considered the case as reported, and, if we understand it correctly, it cannot, in our opinion, be regarded as an authority in favor of equity jurisdiction in the case before us. In this connection it may be borne in mind, as a matter of some importance, that the Wisconsin code of procedure attempts to abolish the distinction between actions at law and in equity; but as to precisely how far that statutory provision has been held to have broken down the distinctions between common law and equitable remedies we do not pretend to be accurately advised. But whether that distinction is held to remain practically unaffected by the statute or not, it appears from the opinion of the court that its jurisdiction to grant a remedy by injunction in that case was based solely upon that provision of the constitution of Wisconsin which gives to the supreme court jurisdiction "to issue writs of *habeas corpus*, *mandamus*, injunction, *quo warranto*, *certiorari*, and other original and remedial writs, and to hear and determine the same." In construing this provision of the constitution the court holds that these various writs, and injunction among them, are prerogative writs, and that the supreme court is thereby given original jurisdiction in all judicial questions affecting the sovereignty

of the state, its franchises and prerogatives, or the liberty of the people, and that injunction and *mandamus* are thereby made correlative remedies, so as to authorize resort to injunction to restrain excess of action, in the same class of cases where *mandamus* may be resorted to for the purpose of supplying defects. Thus the court, in the opinion, quoting the language of a former decision in which this constitutional provision is construed, say: "And it is very safe to assume that the ⁵⁹ constitution gives injunction to restrain excess in the same class of cases as it gives *mandamus* to supply defect; the use of the one writ or the other in each case turning solely on the accident of overaction or shortcoming of the defendant. And it may be, that where defect and excess meet in a single case, the court might meet both, in its discretion, by one of the writs, without being driven to send out both, tied together with red tape, for a single purpose." And again: "Inasmuch as the use of the writ of injunction, in the exercise of the original jurisdiction of this court, is correlative with the writ of *mandamus*, the former issuing to restrain where the latter compels action, it is plain that this case, as against the respondent, is a proper one for an injunction to restrain unauthorized action by him in a matter where his duties are clearly ministerial, and affect the sovereignty, rights, and franchises of the state, and the liberties of the people."

It thus seems plain that, in view of the construction of the constitution of Wisconsin, adopted by the supreme court of that state, the prerogative writ of injunction, of which that court is given original jurisdiction, is a writ of a different nature, and having a different scope and purpose from an ordinary injunction in equity. Where the established distinctions between equity and common-law jurisdiction are observed, injunction and *mandamus* are not correlative remedies, in the sense of being applicable to the same subject matter, the choice of the writ to be resorted to in a particular case to depend upon whether there is an excess of action to be restrained or a defect to be supplied. The two writs properly pertain to entirely different jurisdictions and to different classes of proceedings, injunction being the proper writ only in cases of equitable cognizance, and *mandamus* being a common-law writ, and applicable only in cases coming within the appropriate jurisdiction of courts of common law. Besides, it would seem that in Wisconsin the writ of

injunction, of which the supreme ⁶⁰ court is given original jurisdiction, is not limited, as is the jurisdiction of courts of equity, to cases involving civil or property rights, but may be resorted to in all cases "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people," thus including within its scope the protection of political, as well as civil or property, rights. It thus seems plain that *State v. Cunningham*, 83 Wis. 90, 35 Am. St. Rep. 27, was decided under a judicial system differing essentially from ours, and that it cannot be resorted to as an authority upon the question of the jurisdiction of courts of equity in this state in cases of this character.

The jurisdiction of a court of equity is sought to be sustained in the present cases, however, on the ground that the bills are by taxpayers to restrain the misapplication of public moneys, and the incurring of an unauthorized municipal indebtedness. If it be admitted that a taxpayer may, in a proper case, file a bill in his own name, for such a purpose—a question which we do not deem it necessary to discuss—it seems plain that no case for the interposition of equity on that ground is here made out.

It may be noticed, in the first place, that while it is alleged that holding the election will necessitate a certain amount of election expenses, that fact does not seem to be set forth as an independent, substantive ground for relief, nor does either bill pray that the election itself be enjoined, so as to avoid the incurring of an illegal municipal indebtedness. The act sought to be restrained in one case is the issuing of notices of the election of members of the general assembly in and for the districts formed by the apportionment act of 1893, and the act sought to be enjoined by the other bill is the certifying by the secretary of state of the name of any candidate nominated for election under the acts of 1893, or the act of 1882. But it is not alleged or shown in any way, either directly or by inference, that either of the acts thus sought to be restrained will of themselves involve the expenditure of public money or the incurring of any indebtedness.

⁶¹ The expenditures which the complainants, as taxpayers, might seek to avoid, if any such are to be incurred, will result from the holding of the election, and neither bill prays for an injunction to restrain the public officers from incurring the expenses incident to holding the election itself. Indeed, it is so well settled that equity will not interpose to

restrain the holding of an election, that in drafting the bills the pleaders did not venture to pray for that species of relief. Furthermore, as is of course well known, the election to be held in November, 1894, will not be confined to the choice of senators and representatives in the general assembly, but it will be for the election of state treasurer, members of Congress, and certain county officers, and it is not pretended that, so far as those officers are concerned, the election will be in any respect illegal or unauthorized. Nor is it shown, at least by any clear or intelligible averment, that voting for senators and representatives in the general assembly in and for the districts created by the apportionment acts in question will in any material degree increase the expense of holding the election. In no view, then, can it be held that the complainants, as taxpayers, have made out a case for an injunction to restrain the public authorities from doing acts whereby an illegal public indebtedness will be incurred.

After giving the cases patient consideration we are unanimously of the opinion that these bills present no cases entitling the complainants to relief in a court of equity. Having reached that conclusion it is unnecessary for us to express any opinion upon any other question raised by counsel in their arguments, but, upon the sole ground that the cases made by the bills are not within the jurisdiction of a court of equity, the decrees of the courts below dismissing the bills for want of equity will be affirmed.

POLITICAL RIGHTS, JURISDICTION OF EQUITY TO PROTECT AND ENFORCE. No principle of equity jurisprudence is more definitely fixed or more clearly established than that courts of equity do not interfere, by injunction or otherwise, to determine controversies concerning the appointment or election of public officers or their title to office, or their conduct in the performance of their official duties. Such questions are of a purely legal nature, and cognizable only in courts of law. In accordance with this doctrine it is not within the general powers of a court of equity to supervise the conduct of public officers in the performance of their official duties, or to prohibit them from acting, or to compel them to act, in matters which concern purely political and personal rights as distinguished from rights of property: *Larcom v. Olin*, 160 Mass. 102; *Hardesty v. Taft*, 23 Md. 513; 87 Am. Dec. 584; *State of Georgia v. Stanton*, 6 Wall. 50-77. In the last-named case the court, in its opinion, said "that these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions and upon rights, not of persons or property, but of political character, will hardly be denied, for the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private

property infringed, or in danger of actual or threatened infringement, is presented by the bill in a judicial form, for the judgment of the court." For these reasons it was decided that the court had no jurisdiction in the premises. It was determined in *Story v. Jersey City etc. Co.*, 16 N. J. Eq. 13, 84 Am. Dec. 134, that a court of chancery has no power to restrain a citizen from petitioning the legislature upon any subject of legislation in which he may be interested, and that such restraint, if imposed, would be an unauthorized abridgment of the political rights of the party enjoined. The jurisdiction of a court of equity cannot be invoked to prevent the performance of political duties, like those committed to registration officers under the law: *Hardesty v. Taft*, 23 Md. 513, 530; 87 Am. Dec. 584.

ELECTIONS.—Equity has no power to enjoin the holding of an election for a public office at the suit of citizens and electors, who fail to show that they will be injured by such election either in person or property: *Jones v. Black*, 48 Ala. 540. The reason sometimes given for this rule is, that the power to hold an election is political and not judicial; hence a court of equity has no jurisdiction to restrain officers from the exercise of such power: *Harris v. Schryock*, 82 Ill. 119. In speaking of this question the court, in *Holmes v. Oldham*, 1 Hughes, 76, said: "Whatever may be said of the propriety or impropriety of holding the election in question, we are of opinion that the remedy sought is not a proper one. There is no special wrong or irreparable damage alleged to be done or threatened to the complainants in person or property, but the injury threatened is stated to be the fear of great disorder and confusion which would arise where there were two contending bodies claiming to be the common council of the city, and entitled to govern it. The remedy for this is the writ of *quo warranto* brought by those out of possession of the office against those who hold it, and we know of no case where a court of equity has interposed by injunction to prevent an election upon such general grounds of fear, common to all citizens, even if the law under which it was held was clearly unconstitutional." To the same effect is *Weber v. Timlin*, 37 Minn. 274. When a township election is authorized by law, and called in pursuance of the requirements of such law, equity has no power to restrain the proper officers from holding, or the electors from voting at, such election. A writ of injunction issued in such case is void and without jurisdiction, and the officers and people need not obey it: *Walton v. Develing*, 61 Ill. 201. In a late case, however, it was said: "Conceding that a court of equity has not the power to restrain the municipal authorities from ordering an election in pursuance of any provisions of law for the purpose of selecting officers or determining any question that may be settled by the result of such election, we think that a different rule prevails where, though the election may be lawfully held, it is apparent that no possible benefit will accrue from holding it to the persons at whose instance it is ordered, and where irreparable injury may be done to others who cannot be compensated in damages." In such case an injunction may be granted: *Murfreesboro R. R. Co. v. Board of Commrs.*, 108 N. C. 56-61. It is well settled that a court of chancery has no power to restrain, by injunction, a board of canvassers from canvassing the returns of an election when the law under which the election is held, neither in terms nor by implication confers such power. The reason given is that it is for the political power of the state within the limits of the constitution to provide the manner in which elections shall be held, the vote canvassed, or the election contested, and the courts cannot interfere by injunction: *Dickey v. Reed*, 78 Ill. 261. Hence a court of equity has no jurisdiction to enjoin the secretary of state

from delivering to the speaker of the house of representatives the sealed returns, alleged to be wrongful and illegal, of an election for lieutenant governor, which are directed to such speaker as required by law, in care of the secretary, and are to be delivered to him by the latter: *Smith v. Myers*, 109 Ind. 1; 58 Am. Rep. 375. If an injunction is granted in such case it may be treated as a nullity: *Fleming v. Guthrie*, 32 W. Va. 1; 25 Am. St. Rep. 792. An injunction does not lie to restrain county commissioners or other proper officers from certifying to the governor the result of their canvass of the county vote for a representative in Congress: *Alderson v. Commissioners*, 32 W. Va. 640; 25 Am. St. Rep. 840. Nor to restrain a board of supervisors of a county from giving notice as required by statute of the result of an election held by their order upon the question of the removal of a county seat, when such injunction is asked on the ground that the election was illegally ordered by the board because of their want of jurisdiction: *People v. Board of Supervisors*, 75 Cal. 179.

Title to Office.—It may be stated generally that the right to a public office is not property in any strict legal sense: *Beebe v. Robinson*, 52 Ala. 66; and it is universally conceded and uniformly decided that the title to a public office and the right to exercise its functions cannot be determined in an action for an injunction to restrain the exercise of such functions. Generally, the title to such office can only be questioned by proceedings in the nature of a writ of *quo warranto*, and as an adequate remedy exists at law, it may be broadly stated that an injunction does not lie to try the title to an office: *Hagner v. Heyberger*, 7 Watts & S. 104; 42 Am. Dec. 220; *Burke v. Leland*, 51 Minn. 355; *Cochran v. McCleary*, 22 Iowa, 75; *Markle v. Wright*, 13 Ind. 548; *Kilpatrick v. Smith*, 77 Va. 347; *Neiser v. Thomas*, 99 Mo. 224; *Neeland v. State*, 39 Kan. 154; *Guillotte v. Poincy*, 41 La. Ann. 333; *Prince v. City of Boston*, 148 Mass. 285. The question between contending claimants to the rights and powers of a municipal office, and the question between municipal corporations, each claiming to be invested with authority over the same subject, and each denying the lawful existence of the other, are not questions of equitable cognizance, and can be determined only by *quo warranto* proceedings: *Neeland v. State*, 39 Kan. 154; *City of Detroit v. Board of Public Works*, 23 Mich. 546. When a person has been duly elected or appointed to a public office, and has qualified, he is entitled to enter upon the discharge of the duties pertaining to such office, and, if prevented by a former incumbent from obtaining possession of the office, he has an adequate and complete remedy at law, and consequently a court of equity is without jurisdiction over the matter: *Board of County Commrs. v. Board of School Commrs.*, 77 Md. 283. In *Neiser v. Thomas*, 99 Mo. 224, it was decided that equity has no jurisdiction to interfere in cases of contested elections, even in a collateral or indirect proceeding, as in a bill to enjoin. In this case the court said, though its remarks were not necessary to the decision, that "we are not to be understood as intimating that a court of equity has not power even in an election case, contested or otherwise, to take such steps and to issue such process, if need be, as will prevent some flagrant fraud on the public from being successful. To deny the power to grant such preventive relief in a case, the exigency of which demands it, would be to admit a most serious defect in the form and structure of our government." Under the well-established rule that equity has no jurisdiction to entertain bills to settle disputes relative to the title to public offices it is generally decided that an injunction does not lie to restrain a person acting as a public officer from exercising the functions

of that office on the ground that he is a usurper: *Huels v. Hahn*, 75 Wis. 468. The party claiming to be rightfully entitled to the office has his remedy by *quo warranto*, and he must resort to a court of law: *Foster v. Moore*, 32 Kan. 483; *McDonald v. Rehner*, 22 Fla. 198; *Markle v. Wright*, 13 Ind. 548; *Burke v. Leland*, 51 Minn. 355; *Hagner v. Heyberger*, 7 Watts & S. 104; 42 Am. Dec. 220; *Jones v. Commissioners of Granville*, 77 N. C. 280. The only exception to this rule which has come under observation is that contained in *Kerr v. Trego*, 47 Pa. St. 292, where it is determined that either of two conflicting bodies of men, claiming to hold one and the same office, at the same time, is entitled to an injunction to restrain the other from the usurpation of the powers to which they are not legally entitled. It has been decided in several cases that the remedy by injunction may be employed by the incumbent of a public office to protect his possession against the interference of an adverse claimant whose title is in dispute until the latter shall establish his title at law: *Guillotte v. Poincy*, 41 La. Ann. 333; *Reemelin v. Mosby*, 47 Ohio St. 570; *Armijo v. Baca*, 3 N. Mex. 294; and, when a contestant has been adjudged in a court of law to be entitled to the office contested, a court of equity has no authority to enjoin him from taking possession of the office: *State v. Mayor of Kearney*, 28 Neb. 103. When a person is in possession of an office, although his title thereto is disputed, an injunction does not lie to restrain him from exercising his appointing power under a statute requiring such officer to appoint other officers, on the ground that the statute is unconstitutional: *Reemelin v. Mosby*, 47 Ohio St. 570. Equity has no jurisdiction to interfere by injunction, at the instance of a party who claims the right to an office, to restrain the payment of the salary or fees of such office to the incumbent, pending a contest at law, as to the right to the office: *Colton v. Price*, 50 Ala. 424; *Stone v. Wetmore*, 42 Ga. 601. A court of chancery has no jurisdiction of a bill to enjoin the removal of a party from a public office, and the appointment of a successor, and to prevent the removing power from interfering with him in the discharge of his duties after his removal. The party removed has a complete remedy at law by *quo warranto* against his successor, or by *mandamus* against the removing power: *Delahanty v. Warner*, 75 Ill. 185; 20 Am. Rep. 237; and an injunction issued in such case is absolutely void: *In re Sawyer*, 124 U. S. 200. An officer wrongfully removed from office cannot be restored to it by injunction. The right to the office can only be determined in a proper action at law: *Sherman v. Clark*, 4 Nev. 138; 97 Am. Dec. 516.

FARWELL v. HUSTON.

[151 ILLINOIS, 239.]

PARTNERSHIP—APPLICATION OF PARTNERSHIP ASSETS TO FIRM DEBTS.—

The right in equity of firm creditors to payment out of the partnership effects, to the exclusion of the separate creditors of deceased or insolvent partners, results solely from the right of the partners, or their representatives, to have the joint estate thus applied. The rule is for the benefit and protection of the partners themselves. The equity of the creditor is of a dependent and subordinate character.

JUDGMENTS BY CONFESSION—RELIEF.—A court of law exercises equitable jurisdiction over a judgment by confession, and, if there is an absence

of authority to confess, the debtor is not forced into a court of equity to obtain relief, but may move to set aside the judgment before the court of law which rendered it; such court may open the judgment and permit the debtor to present his defense if he have any, and at the same time protect the creditor, by permitting the judgment to stand as security.

JUDGMENTS BY CONFESSION—WHO MAY OBJECT TO.—A third party has no right to object to a judgment by confession, on the ground that it was confessed without any authority from the judgment debtor. This right belongs alone to the latter.

JUDGMENTS BY CONFESSION—RENDERED IN OPEN COURT OR IN VACATION. There is a broad distinction between cases wherein judgment is confessed in open court and cases where it is confessed in vacation. In the latter case the authority of the attorney must affirmatively appear, while in the former the presumption is in favor of the validity of the judgment.

JUDGMENTS BY CONFESSION—WHO MAY OBJECT.—A warrant of attorney to confess judgment executed by two parties in their individual names, if not sufficient to authorize the confession of judgment against them in their firm name, can only be objected to by them, and not by the creditors of the firm.

JUDGMENTS BY CONFESSION BEFORE MATURITY OF DEBT—SUFFICIENCY OF WARRANT OF ATTORNEY.—A warrant of attorney to confess judgment reciting that in consideration thereof we do hereby make, constitute, and appoint a certain person named to be our true and lawful attorney, for us and in our name, to appear before any court of record, and at any time after the date hereof, to waive service of process and confess judgment against us, or either of us, and in favor of the holder of this note, for as much as appears to be due according to date and tenor hereof, is sufficient to authorize the confession of judgment thereon, before the maturity of the note.

MOTION for a rule against a sheriff to compel him to pay over money. On October 9, 1890, five judgments by confession were rendered in the circuit court against G. B. Cook and J. A. McDonald, partners, as George B. Cook & Co., one in favor of Carson, Pirie, Scott & Co., for \$1,752.01, one in favor of the Will County National Bank for \$429.25, one in favor of G. Cook for \$419.25, and two in favor of J. V. Farwell & Co., one for \$2,658.40, and the other for \$250.64. The sheriff received executions on these several judgments in the order as to time in which they are above named. The above-named judgment debtors as partners were doing a dry goods business under the firm name of George B. Cook & Co., at the time the five notes upon which the judgments were confessed were executed and the judgments confessed. Such judgments were confessed in open court by attorneys, under virtue of warrants of attorney contained in the five several notes. The sheriff levied the execution in favor of Carson,

Pirie, Scott & Co., upon a stock of merchandise, the firm property of George B. Cook & Co., and afterwards, on November 5, 1890, sold it for \$4,275, which he still held at the time of this suit. On November 6, 1890, J. V. Farwell & Co. moved the court for a rule absolute against the sheriff to compel him to pay to them the proceeds of said sale in satisfaction of their judgment and execution for \$2,658.40. The court overruled the motion for the rule absolute, and Farwell & Co. appealed.

Snapp and Breckenridge, for the appellants.

C. W. Brown, E. Phelps, and E. Meers, for the appellees.

243 BAKER, J. Appellants contend that their judgment for \$2,658.40 against George B. Cook & Co., and that judgment alone, of the five rendered against the said firm, is a valid judgment against the copartnership composed of George B. Cook and John A. McDonald, for the alleged reason that the warrant of attorney, contained in the note upon which that judgment was confessed, authorized the confession of a judgment against George B. Cook & Co., while, in so far as the records show, no such authority was conferred by the warrants of attorney contained in the several notes upon which the other four judgments were confessed.

We will consider those judgments in the order in which they were respectively rendered. First, as to the judgment in favor of Carson, Pirie, Scott & Co., appellants' contention is that that judgment is a valid judgment only as against George B. Cook, and John A. McDonald, individually, and not against the copartnership of George B. Cook & Co., because, as they claim, the note and warrant of attorney upon which the Carson, Pirie, Scott & Co. judgment was confessed was signed by George B. Cook and John A. McDonald as individuals, and not by the firm name; that the record discloses no proof that the note was intended to bind the copartnership, or that it was given for a firm indebtedness, and that consequently the court had no jurisdiction to enter judgment against George B. Cook & Co., and that this being the case, **244** Carson, Pirie, Scott & Co. have no lien upon the copartnership property levied upon under their execution. We do not concur in appellants' views in this behalf. The Carson, Pirie, Scott & Co. note and warrant of attorney was signed "Geo. B. Cook, Jno. A. McDonald," while appellants' note and warrant of attorney was signed "Geo. B. Cook &

Co., Geo. B. Cook, John A. McDonald." In so far as the records show, appellants are in no better position than Carson, Pirie, Scott & Co.; for if the record in the Carson, Pirie, Scott & Co. case does not disclose who were the partners composing the firm of George B. Cook & Co., or that the note and warrant of attorney upon which judgment was confessed in their favor against said George B. Cook & Co. were intended to bind the copartnership, or that they were given for a firm indebtedness, neither does the record in appellant's case disclose these facts in respect to their judgment. The mere fact that the one paper contained only the signatures of George B. Cook and John A. McDonald, while the other paper contained the additional signature of "Geo. B. Cook & Co.," does not give to appellants the right to have the payment of their judgment against George B. Cook & Co., out of the copartnership property, advanced as against the Carson, Pirie, Scott & Co. judgment, when the evidence shows that the Carson, Pirie, Scott & Co. judgment was rendered for a firm indebtedness: *Ladd v. Griswold*, 9 Ill. 25; 46 Am. Dec. 443; *Hanford v. Prouty*, 133 Ill. 339; *Hapgood v. Cornwell*, 48 Ill. 64; 95 Am. Dec. 516. In the opinion of the court in the case last cited it is said that the right of the members of a copartnership to have partnership property first applied to the payment of firm debts "is the equitable lien of the partners that is worked out for the benefit of the creditors, and not a lien inhering in the creditors themselves. . . . The partners are the owners of the goods, free from any lien on the part of their creditors, and if they choose to let one member use them in payment²⁴⁵ of his individual debt, they have a legal right to do so, and the individual creditor has a legal right to receive payment in that mode."

If the Carson, Pirie, Scott & Co. judgment was rendered against the firm of George B. Cook & Co., when it should have been rendered against George B. Cook and John A. McDonald, as individuals, as is contended by appellants, it is the province of the defendants named in such judgment, and not of appellants, to object thereto: *Ladd v. Griswold*, 9 Ill. 25; 46 Am. Dec. 443; *Hapgood v. Cornwell*, 48 Ill. 64; 95 Am. Dec. 516; *Hanford v. Prouty*, 133 Ill. 339; *Hier v. Kaufman*, 134 Ill. 215. In *Ladd v. Griswold*, 9 Ill. 25, 46 Am. Dec. 443, it is said: "The right in equity of the joint creditors to seek payment out of the partnership effects, to the exclusion of the separate creditors of deceased or insolvent

partners, results solely from the right of the partners or their representatives to have the joint estate thus applied. The rule is for the benefit and protection of the partners themselves. The equity of the creditor is of a dependent and subordinate character, and is to be worked out and enforced through the medium of the equities of the partners." But few of the authorities cited by appellants in support of their contention in this branch of the case have any direct application to the case at bar.

And second, in respect to the judgments rendered against George B. Cook & Co., in favor of appellees, the Will County National Bank and George Cook, appellants seek to have the payment of their aforesaid judgment against George B. Cook & Co., out of the copartnership property, advanced as against those judgments, for the further reason, as they contend, that in neither of those cases does the record disclose any authority on the part of George B. Cook to sign the firm name to the notes and warrants in question. The notes and warrants of attorney upon which those judgments were confessed were signed "Geo. B. Cook & Co." In the national bank case it appears from ²⁴⁶ the affidavit of George A. Vance, filed with the declaration, that the signature of George B. Cook & Co. to their note and warrant of attorney was executed by George B. Cook, a member of said firm, in the presence of the affiant, and for the purposes of said firm, and that the signature to the said note and warrant was the genuine signature of George B. Cook & Co. In the case of George Cook (who is not to be confounded with George B. Cook, one of the defendants, against whom the five judgments here in controversy were rendered), the affidavit of George S. Hinckel, in respect to the signing of the note and warrant given to George Cook, is to the same effect.

This court has held, in a number of cases, that a court of law exercises an equitable jurisdiction over a judgment by confession; that, if there is an absence of authority to confess, the debtor will not be forced into a court of chancery to obtain relief, but may move to set aside the judgment before the court of law which rendered it; and that such court of law may open the judgment, and permit the debtor to present his defense to the claim, if he have any, but will, however, protect the creditor by permitting the judgment to stand as security. Yet such relief will not be granted if it appears that the debtor owes the amount of the judg-

ment, and has no defense, either legal or equitable, to the debt for which the judgment is rendered: *Colson v. Leitch*, 110 Ill. 504; *Hier v. Kaufman*, 134 Ill. 215. The same doctrine is stated in *Freeman on Judgments*, section 498. See, also, *Martin v. Judd*, 60 Ill. 78, where it was held that a third party has no right to object to a judgment on the ground that it was confessed without any authority from the judgment debtor to do so, but that the right to interpose any such objection belongs alone to the judgment debtor. It was also held in said case that there is a broad distinction between cases wherein the proceedings are had in open court and cases where the judgment is confessed in vacation; that in the latter case the authority of the attorney ²⁴⁷ must affirmatively appear, while in the former case the presumption will be in favor of the validity of the judgment.

The case of *Sloo v. State Bank etc.*, 1 Scam. 428, cited both by appellants and appellees herein, differs from the case at bar in this very material point, that in that case the objection to the judgment against the firm of Sloo & Co., and the motion to set such judgment aside, were made by Sloo, one of the members of the firm against whom the judgment had been rendered, and not by one of the creditors of the firm, as is the case here. In most of the other cases cited by appellants in support of the position assumed by them in respect to the judgments of the Will County National Bank and George Cook, respectively, the judgments were confessed in vacation, and not in open court in term time, as were all five of the judgments in question in the case at bar, and the decisions in those cases turned largely upon that point. If the judgment records in the national bank and George Cook cases fail to disclose any authority, on the part of George B. Cook, to sign the firm name to the notes and warrants upon which those judgments were confessed, the judgment debtors, if they have a good defense, may avoid those judgments by proper proceedings in the court in which they were rendered; but a third party, even though he be a creditor, cannot object to them, for his equities, if he have any, are dependent solely upon and are worked out only through those of the judgment debtors: *Martin v. Judd*, 60 Ill. 78; *Hier v. Kaufman*, 134 Ill. 215; *Freeman on Judgments*, sec. 498.

And appellants' third contention, that the judgment note given to the Will County National Bank was not due at the time the judgment was confessed, and that the warrant of

attorney contained therein did not authorize the confession of a judgment before the note became due, is likewise without merit. The portion of the warrant complained of is in these words: "And in consideration thereof, ²⁴⁸ we do hereby make, constitute, and appoint Egbert Phelps, or any other attorney at law of any court of record, to be our true and lawful attorney, irrevocably for us and in our name, place, and stead, to appear before any court of record in any of the states or territories in the United States, in term time or vacation, at any time after the date hereof, and to waive service of process, and confess a judgment against us, or either of us, and in favor of the holder of this note for the above sum, or for as much as appears to be due according to the tenor and effect hereof." We fail to see why the warrant in the said note did not authorize the confession of a judgment thereon "at any time after the date" thereof.

In our opinion neither of the judgments objected to by appellants is void; and we are also of opinion that appellants are not in a position to claim, of their own motion, the benefit of any equities in respect to the said judgments, or any of them, which may belong to George B. Cook, or to John A. McDonald, or to the copartnership of George B. Cook & Co.

The judgment of the appellate court is affirmed.

PARTNERSHIP ASSETS—RIGHT OF PARTNER TO HAVE APPLIED TO FIRM DEBTS.—One member of a partnership cannot appropriate the firm assets by transferring them in satisfaction of his individual debt without the consent of his copartners, as such a transaction would be a fraud on the latter: *Cannon v. Lindsey*, 85 Ala. 198; 7 Am. St. Rep. 38, and note; *Davies v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373, and extended note; *Janney v. Springer*, 78 Iowa, 617; 16 Am. St. Rep. 460, and note; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495; 22 Am. St. Rep. 742, and note; and as each partner has the right in equity to have the property of the firm applied to the payment of the partnership debts: *Reyburn v. Mitchell*, 106 Mo. 365; 27 Am. St. Rep. 350, and note; *Manhattan Ins Co. v. Webster*, 50 Pa. St. 227; 98 Am. Dec. 332, and note. Each partner has a lien upon partnership property to the end that he may insist that it be first applied to the payment of partnership debts: *Arnold v. Wainwright*, 6 Minn. 358; 80 Am. Dec. 448, and note; *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697, and note.

JUDGMENT BY CONFESSION—RELIEF FROM—WHERE OBTAINED.—If a defendant desires to take advantages of irregularities in the entry of a judgment by confession he must apply to the court in which it was entered: *Atkinson v. Foster*, 134 Ill. 472. Mistake in a confession of judgment will be corrected by the court in which the same was made: *Mills v. Lumpkin*, 1 Ga. 511; 44 Am. Dec. 677. Courts of law exercise equitable jurisdiction

over judgments entered upon warrants of attorney, and will, upon motion, stay, modify, or vacate them, and award issues for the trial of facts as the ends of justice may require: *McIndoe v. Hazelton*, 19 Wis. 567; 88 Am. Dec. 701, and note.

JUDGMENTS BY CONFESSION—OBJECTION TO BY THIRD PARTY.—A judgment by confession cannot be attacked for intervening errors at the instance of one not a party, where it was rendered in open court upon an allegation of indebtedness and an appearance of the parties: *Cloud v. El Dorado County*, 12 Cal. 128; 73 Am. Dec. 526, and note.

JUDGMENTS BY CONFESSION—CONSTRUCTION OF WARRANT OF ATTORNEY.—A warrant of attorney to confess judgment must be strictly construed: *Spence v. Emerine*, 46 Ohio St. 433; 15 Am. St. Rep. 634; *Gardner v. Bunn*, 132 Ill. 403; and must be given in clear and precise language: *Reid v. Southworth*, 71 Wis. 288. See, also, *Little v. Dyer*, 138 Ill. 272; 32 Am. St. Rep. 140, and note, and the extended notes to *Lee v. Figg*, 99 Am. Dec. 276, and *Davenport v. Parsons*, 81 Am. Dec. 777.

WESTERN STONE COMPANY v. WHALEN.

[151 ILLINOIS, 472.]

MASTER AND SERVANT—INCOMPETENT SERVANT—CONCLUSIVENESS OF FINDING OF NEGLIGENCE.—The fact as to whether a master is guilty of negligence in the employment and retention of an incompetent servant, whereby a fellow-servant is injured, is conclusively determined by the finding of the trial court in favor of the latter.

MASTER AND SERVANT—INCOMPETENT FELLOW-SERVANT—NEGLIGENCE—EVIDENCE.—Negligence on the part of a master is not to be presumed from the negligence of a servant; but, in order to render him liable for injuries sustained by one servant from the negligence of another, some sort of negligence on the part of the master, either in the employment or retention of the servant, must be shown, and the servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation or unfitness on the master's part is not shown.

MASTER AND SERVANT—INCOMPETENT FELLOW-SERVANT—NEGLIGENCE—EVIDENCE.—A servant injured by the incompetency of a fellow-servant may prove that the latter's incompetency was actually known to the master, or to his responsible representative, to whom the power of discharging has been delegated, or that either of them had received information of the fact sufficient to put a reasonably careful man upon inquiry, or that the servant had a general reputation for incompetency to such extent that, if the master had maintained a habit of vigilant supervision and inquiry, he would probably have learned the fact.

MASTER AND SERVANT—INCOMPETENT FELLOW-SERVANT—NEGLIGENCE—EVIDENCE.—Evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master may of itself, where it is his imperative duty to know the fitness of his servant, and when inquiry would have led to the knowledge, be such negligence as to charge the master with liabil-

lity for injury to another servant, inflicted by such incompetent fellow-servant.

MASTER AND SERVANT—RISKS ASSUMED BY SERVANT—NEGLIGENCE OF FELLOW-SERVANT.—A servant upon entering an employment assumes the natural and ordinary risks incident to the business in which he engages, and impliedly contracts that the master shall not be liable for injuries, consequent upon the negligence of a fellow-servant in the employment of whom the master has exercised due and proper care.

MASTER AND SERVANT—CARE REQUIRED IN SELECTION OF EMPLOYEES.—It is the duty of the master to exercise ordinary and reasonable care in the employment and selection of careful and skillful coemployees, and such care requires a degree of diligence and caution proportionate to the exigencies of the particular service, and is such care as a reasonably prudent person would exercise, in view of the consequences that might reasonably be expected to result if an incompetent, careless, or reckless servant was employed for the particular duty.

MASTER AND SERVANT—DUTY TO EMPLOY COMPETENT SERVANTS.—A master who employs a servant to engage in a business, known to be hazardous, and when the proper and safe discharge of the duty requires a high degree of care, diligence, and skill, is charged with the exercise of care reasonably commensurate with the perils and hazards likely to be encountered in the performance of the duty, and the master impliedly contracts with each servant entering his employ to discharge that duty, and the servant may, without sufficient appearing to put him upon notice to the contrary, rely upon the due and reasonable performance of such duty by the master.

MASTER AND SERVANT—HAZARDOUS EMPLOYMENT—DUTY TO SELECT COMPETENT SERVANTS—NEGLIGENCE.—When the service in which a servant is employed is such as to endanger the life and limbs of co-employees the master, upon engaging such servant, is required to make reasonable investigation into his character, skill, and habits of life, and his failure to perform this duty is negligence, for which he is liable if injury is occasioned to a co-employee, either by the negligence, incapacity, or intemperance of such servant.

MASTER AND SERVANT—INCOMPETENT FELLOW-SERVANTS—EVIDENCE OF GENERAL REPUTATION.—When injury has occurred to a servant through the incompetency, recklessness, or unskillfulness of a fellow-servant, who is generally known and reputed to be unfit, reckless, or unskillful, evidence that he is generally so reputed, or of specific acts of negligence, is competent, as tending to show that the master, by the exercise of that ordinary and reasonable care required in his employment could and ought to have known of his unfitness, want of skill, or reckless habits.

MASTER AND SERVANT—PRESUMPTION AS TO COMPETENCY OF FELLOW-SERVANTS.—A servant, upon entering an employment, has a right to assume that the master has discharged his legal duty in selecting competent and careful co-employees, and may act upon that assumption in the absence of any thing putting him upon notice to the contrary. The fact as to whether he has had such notice as to require him to quit the service or assume the extra risk is conclusively determined by the finding of the trial court.

MASTER AND SERVANT—SERVANT'S NOTICE OF INCOMPETENCY OF FELLOW-SERVANT.—If a servant knows, or, by the exercise of reasonable care and diligence should know, the general reputation of his fellow-servant

for skill and care, before and at the time of receiving an injury at the hands of the latter, he is charged with notice of whatever that reputation is, and, if it is bad, he must not expose himself to the consequences liable to result.

MASTER AND SERVANT—EVIDENCE OF INCOMPETENCY OF FELLOW-SERVANT.

While specific acts of recklessness, carelessness, or incompetency by a fellow-servant may, under the circumstances of a particular case of injury to another servant, be competent as tending to show that the master could and ought to have known of the character and habits of his servant, yet, when the reputation of such servant is competent to be shown, it is his general reputation only.

PRACTICE—ARREST OF JUDGMENT.—An objection that a cause of action is defectively stated in the complaint cannot be urged on motion in arrest of judgment.

ACTION for personal injury resulting in the loss of a leg. The Western Stone Company owned a steam propeller used in towing its canal-boats and barges. This propeller was in charge of one Cooley, while the appellee, Whalen, had charge of one of the many barges owned and operated by the said company. It was customary for said propeller to take two or three of said barges in tow at one time, and it was alleged that, owing to the carelessness and negligence of Cooley in running too fast in making up a tow, Whalen was caught in a tow-line and his leg crushed. Judgment for Whalen, and the said company appealed. The following requests for special findings were given and answered as follows:

“2. Was it necessary for the captain of the steamboat *Excelsior* to run that boat at a higher rate of speed than usual in order to keep her headway, or to keep her from blowing across the river? A. No.

“3. Did the plaintiff use his tow-line to fasten the canal-boat *Rescue* to the tow? A. Yes.

“6. Did the plaintiff see and know of the rate of speed at which the *Excelsior* was going, before and at the time of the injury? A. He knew the rate of speed immediately before the injury, but not at the time of the injury.

“7. Was the *Excelsior* going at too great a rate of speed? A. Yes.

“8. Was she going at such a rate of speed as to make it dangerous to attempt to make fast to the *Servia*? A. No; not if Captain Cooley had slacked down his speed.

“9. Was she going, just before and at the time of the accident, at a dangerous rate of speed? A. Yes.

“11. Did the accident happen from his being caught in the tow-line? A. Yes.

"12. Was his leg caught in the tow-line and dragged against the sampson post? A. Yes.

"13. Did the fracture and injury to his leg happen in this way? A. Yes.

"16. Could the plaintiff, by the exercise of ordinary care, have avoided the alleged accident? A. No.

"17. Was the plaintiff a co-employee with Captain Cooley? A. Yes.

"18. Was he associated with Captain Cooley and engaged in the same line of business, at the time of the alleged injury, namely, making up the tow? A. Yes.

"19. Was Captain Cooley guilty of negligence in running the *Excelsior* at too high a rate of speed? A. Yes.

"20. Did the injury to the plaintiff occur from the negligence of Captain Cooley in running the *Excelsior* at too high a rate of speed? A. Yes.

"21. Was the danger from which the injury resulted one which the plaintiff was acquainted with or might have foreseen, by the exercise of ordinary care and prudence? A. No.

"23. Was the plaintiff guilty of negligence in placing himself in a dangerous position, but for which the accident would not have happened? A. No.

"24. Was the plaintiff's negligence gross when compared with that of the defendant? A. No.

"25. If you believe from the evidence that, after the employment of said Cooley, and before the said alleged accident, his reputation for being a competent, careful, and skillful man in running and operating the said steamboat *Excelsior* was bad, do you find from the evidence that the defendant's manager had any notice of such fact? A. No."

Schuyler and Kremer, for the appellant.

Duncan and Gilbert, for the appellee.

479 SHOPE, J. As we understand this record, the right of recovery by plaintiff, under the first and third counts of his declaration, is eliminated by the finding of the jury that Cooley, captain of the steam propeller, and the plaintiff were fellow-servants 480 in the same line of employment. And this, as we understand, is conceded by counsel on both sides. And it seems clear that the recovery was predicated, and by the court permitted to stand, upon the second count of the declaration, which alleged, among other things, that it was the duty of the defendant to employ a prudent and competent

captain for said steam propeller, but the defendant, disregarding its duty in that behalf, employed one who was incompetent, etc., which was unknown to the plaintiff, and that, by reason of the incompetency, etc., of said captain, the plaintiff, while in the exercise of due and proper care and caution on his part, was injured, etc.

The jury were requested to make, and made, as will be seen from the foregoing statement, a number of special findings at the instance of appellant. The jury found that the propeller was run at an unusual, too great, and a dangerous rate of speed in making up the fleet, and at the time of the injury to plaintiff; that the rate of speed was not dangerous, if the captain of the propeller had slackened it when attempting to pick up the *Rescue*, of which plaintiff was in charge; that the plaintiff knew the rate of speed at which the propeller was going before, but not at the time of the injury; that Cooley was guilty of negligence in running the propeller at too high a rate of speed, and that the injury to plaintiff resulted from such negligence. They also specially found that the plaintiff could not, by the exercise of ordinary care, have avoided the injury; that the danger from which the injury resulted was not one which might have been foreseen by the plaintiff in the exercise of ordinary care and prudence; and that the plaintiff was not guilty of negligence in placing himself in a dangerous position, etc. They also found that the plaintiff and Cooley, captain of the propeller, were fellow-servants.

No instruction was given on the part of the plaintiff, except one announcing the general rule to be observed in determining the weight to be given to the testimony of the various witnesses.

481 By the second instruction given on behalf of appellant the jury were told that, if they found that plaintiff and Cooley were co-employees, engaged in the same line of service, then, although the jury believed that the injury was occasioned by the negligence, carelessness, or unskillfulness of Cooley, the plaintiff could not recover, unless they further believed from the evidence that in the employment of said Cooley, as captain of said steam propeller, the defendant did not exercise ordinary care and caution. The third instruction given for appellant was to the same effect, and informed the jury that although they believed that Cooley ran the steam propeller at too high rate of speed, and that in doing so he run and

operated the same in a negligent and careless manner, and that the injury resulted from such negligence, this was one of the risks assumed by plaintiff in entering into the employment, and plaintiff could not recover "unless the jury shall further believe from the evidence that said defendant was guilty of a want of ordinary care and prudence in employing said Cooley."

Without extending the discussion it seems manifest, from the course of the trial, the instructions of the court, and the findings of the jury, that the right of the plaintiff to recover depended upon the question of whether defendant was or was not guilty of negligence in the employment and retention of said Cooley, as captain of its steam propeller, used in making up and transporting its fleet of boats.

Whether the defendant was guilty of negligence in the respect indicated was a question of fact which has been conclusively determined against appellant by the judgment of the appellate court, approving the finding of the lower court upon questions of fact.

It only remains to consider whether error intervened in the rulings of the court in the admission of testimony, and upon instructions, and in overruling the motion in arrest of judgment.

⁴⁸² The plaintiff, for the purpose of carrying knowledge home to the defendant of the incompetency and reckless character of the person they had employed as captain of their towing vessel, offered proof tending to show the general reputation of said captain, as to prudence and carefulness in running and managing the steamboat, and that such general reputation was bad, along the line of the Illinois and Michigan canal and Chicago river, where the defendant was transacting its business. It appeared from the evidence that he had been engaged in that business about nine years, as we understand it, upon the same waters. It is objected that no time was fixed to which the attention of the witnesses was called. We think the objection without merit. Aside from the general rule that a state of facts once shown to exist is presumed to continue until the contrary is made to appear, the attention of the witnesses was sufficiently directed to cover the time while he was so running upon such waters. It is not questioned that there was evidence before the jury tending to show that the captain was guilty of negligence from which the injury resulted, and it became important and

proper for plaintiff to show, if he could, that the defendant was guilty of negligence in employing him and keeping him in command, in making up and transporting their fleet of boats.

It is insisted by counsel for appellant that evidence offered for the purpose of charging the principal with notice, in actions of this character, should be of specific acts of negligence and carelessness, to be proved as facts, and that proof of general reputation, as to the manner of running and operating the boat, was insufficient and incompetent as evidence tending to charge the defendant with notice of the fact of the incompetency or unskillfulness of the person employed. That proof of such specific acts is competent seems to be well settled: See Wood's Master and Servant, sec. 431, note, and cases there cited. Thus, in *Hilts v. Chicago etc. Ry. Co.*, 55 Mich. 437, the court ⁴⁸³ say: "When, however, as in this case, through the negligent act of a servant, who was in an intoxicated condition, and when it is further shown that he was in the habit of drinking intoxicating liquors to excess, such habit had extended over a period of nine months while in the defendant's employ, and no actual knowledge or notice ever reached any superior officer, we think the jury may be justified in concluding from such evidence that the defendant was negligent in failing to learn such habit, and retaining the engineer in its employment": See, also, *Gilman v. Eastern R. R. Co.*, 10 Allen, 233; 87 Am. Dec. 635; *Gilman v. Eastern R. R. Co.*, 13 Allen, 444; 90 Am. Dec. 210; *Monahan v. Worcester*, 150 Mass. 439; 15 Am. St. Rep. 226; *Grube v. Missouri Pac. Ry. Co.*, 98 Mo. 330; 14 Am. St. Rep. 645; *Lee v. Michigan Cent. R. R. Co.*, 87 Mich. 574.

It seems, however, that when it becomes material to prove the character of a servant by whose negligence the injury has happened, as where the contention is that the master has violated his duty in employing an unskillful and incompetent servant, evidence of general reputation of the servant is competent: 2 Thompson on Negligence, 153. Wood on Master and Servant, section 420, says: "Negligence on the part of the master is not to be presumed from the negligence of a servant, but in order to render him liable for injuries sustained by the servant from the negligence of another, some sort of negligence on the part of the master, either in the employment or retention of the servant, must be shown, and the servant's general reputation for unfitness may be suffi-

cient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation or unfitness on the master's part is not shown."

Shearman and Redfield on Negligence, section 223, is as follows: "In applying the rule just stated it is clearly sufficient for a servant injured by the incompetency of a fellow-servant to prove that such fellow-servant's incompetency was actually known to the master, or to his responsible ⁴⁸⁴ representative to whom the power of discharging had been delegated, or that either of them had received information of the fact sufficient to put a reasonably careful man upon inquiry, or that the servant had a general reputation for incompetency to such an extent that, if the master had maintained a habit of vigilant supervision and inquiry, he would probably have learned the fact."

We quote these text-writers, Thompson, Wood, and Shearman and Redfield, as showing the consensus of opinion among standard authors upon this question. It will be found that they are supported by a large number of well-considered cases, and indeed what seems to be the clear weight of authority: See 7 Am. & Eng. Ency. of Law, 852; *Lake Shore etc. Ry. Co. v. Stupak*, 123 Ind. 210; *Hatt v. Nay*, 144 Mass. 186; *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 124; 4 Am. Rep. 364, and cases *supra*. See, also, *Chicago etc. R. R. Co. v. Shannon*, 43 Ill. 343; *Toledo etc. R. R. Co. v. Bailey*, 145 Ill. 159.

The authorities sustain the position that evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master may of itself, where it is his imperative duty to know the fitness of his servant, and where inquiry would have led to the knowledge, be such negligence as to charge the master. The servant, upon entering the employment, is held to assume the natural and ordinary risks incident to the business in which he engages, and impliedly contracts that the master shall not be liable for injuries consequent upon the negligence of a fellow-servant, in the employment of whom the master has exercised due and proper care. And it is the duty of the master to exercise ordinary and reasonable care in the employment and selection of careful and skillful co-employees. What is the exercise of such care has been the subject of much discussion, and of some difference in adjudged cases. It may, however,

be confidently asserted that the great weight of ⁴⁸⁵ authority, and, according to the best-considered cases, ordinary care in the employment of servants require a degree of diligence and caution proportionate to the exigencies of the particular service. It is such care as a reasonably prudent person would exercise, in view of the consequences that might reasonably be expected to result if an incompetent, careless, or reckless servant was employed for the particular duty. Where, therefore, a master employs a servant to engage in a business known to be hazardous, and where the proper and safe discharge of the duty requires a high degree of care, skill, and diligence, the master will be held in the selection of the servant to the exercise of care reasonably commensurate with the perils and hazards likely to be encountered in the performance of the duty. And the master impliedly contracts with each servant entering his employ that he has and will discharge that duty, and the servant may, without sufficient appearing to put him upon notice to the contrary, rely upon the due and reasonable performance of it by the master. Where the service in which the servant is employed is such as to endanger the life and persons of co-employees, upon the plainest principles of justice and good faith, the master, upon engaging such servant, should be required to make reasonable investigation into his character, skill, and habits of life.

And it has been held with practical unanimity that a failure to make such reasonable investigation is negligence on the part of the master, and he is held liable for an injury to a co-employee occasioned either by the negligence, incapacity, or intemperance of such servant: Cases *supra*; *Columbus etc. R. R. Co. v. Troesch*, 68 Ill. 545; 18 Am. Rep. 578; *Illinois Cent. R. R. Co. v. Cox*, 21 Ill. 20; 71 Am. Dec. 298; *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454; *Union Pac. Ry. Co. v. Young*, 19 Kan. 488.

It logically follows that where an injury has occurred through the incompetency, recklessness, or unskillfulness ⁴⁸⁶ of a servant who was generally known and reputed to be unfit, reckless, or unskillful, evidence of the fact that he was generally so reputed is competent, as tending to show that the master, by the exercise of that ordinary and reasonable care required in his employment, could and ought to have known of his unfitness, want of skill, or reckless habit.

It will be found upon examination of the cases cited, and

they are sustained by the clearest reasoning, that it is wholly unimportant whether the master, in fact, knew of the character and habit of the servant. As said by Cooley, J., in *Davis v. Detroit etc. R. R. Co.*, 20 Mich. 124, 4 Am. Rep. 364: "The ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative": Citing *Wright v. New York Cent. R. R. Co.*, 25 N. Y. 566.

It is said that the preponderance of the evidence fails to show the bad character of the servant in charge of the towing vessel. The answer is, that was a question of fact, the determination of which is by law committed to the trial and appellate courts. Those courts alone are judges of the weight and credibility of the evidence.

The effect of this evidence was attempted to be limited by the instruction marked "13," given at the instance of appellant, as favorably to it as could be demanded. The jury were told that, "in order to charge the defendant with the fact of said Cooley's bad reputation" (if they believed from the evidence it existed), "the jury must also believe from the evidence that such reputation must have been so open, notorious, and well known, where he was running and operating said steamboat, as to make it the duty of said defendant or its managers to inquire into and ascertain the facts in regard to such reputation." More than this the defendant could not require.

It is, however, insisted that the plaintiff is shown to have had the same opportunity to have known of the reckless ⁴⁸⁷ habit of Cooley that defendant is charged with having, and that the failure to inform himself in respect thereof was negligence so contributing to the injury that no recovery can be had. As already said, the plaintiff, upon entering the employment, had a right to assume that the defendant had discharged its legal duty in selecting his co-employees, and might act upon that assumption in the absence of any thing putting him upon notice to the contrary: *Pullman Palace Car Co. v. Laack*, 143 Ill. 257. Whether there was evidence of fact sufficient to put him upon notice, and requiring him to quit the service or assume the extra hazard, was a question of fact, which, by the statute, we are precluded from investigating, and of which the judgment of the appellate court is conclusive.

The plaintiff denied all knowledge of the want of skill and care of the captain of the towing vessel, or of his reputation in that regard, and whether, under the circumstances shown, he was bound to take notice thereof was, as before said, a question of fact.

It is insisted that the court erred in refusing the instruction asked by appellant, and marked 16. The instruction as asked is faulty in instituting a comparison of opportunities between the plaintiff and defendant to become acquainted with and know the reputation of Cooley. The law undoubtedly is, that if the plaintiff knew, or by the exercise of reasonable care and diligence could know, the reputation of Cooley for carefulness and skillfulness in the management of his vessel, before and at the time of the injury, he was chargeable with notice of whatever that reputation was, and, if such reputation was bad, should not have exposed himself to the consequences liable to result. The instruction wholly ignores the necessity for the exercise of reasonable care and diligence on the part of the plaintiff. By it the jury were required to balance the opportunities as between the plaintiff and defendant merely, without any guide as to when either party should be chargeable ⁴⁸⁸ with knowledge of the fact. Nor is there any thing in the other instructions asked or given that aids this instruction. It was also faulty in not confining the knowledge to the general reputation of Cooley in the respect indicated. While, as we have seen, specific acts of recklessness, carelessness, or incompetency may, under the circumstances of the particular case, be competent as tending to show that the employer could and ought to have known of the character and habit of his servant, on the other hand, when the reputation of the servant is competent to be shown, it is the general reputation only.

In respect of other instructions refused it may be said that every principle proper to be given is covered by those given. That the court was not bound to repeat instructions is too familiar to require the citation of authority.

Twenty-nine requests for special findings were asked by appellant. Eighteen of them were submitted to the jury, and eleven refused. This is also insisted upon as error. Without extending this opinion by a separate consideration of each refused request, it may be said that all that is important in them, that could have had any controlling effect

upon the verdict, is fully covered by those submitted. And, if it was otherwise, they relate to evidentiary facts, and not to the finding of any ultimate or controlling fact. We are of the opinion that there was no abuse of discretion by the trial court in refusing the same.

It is lastly insisted that the court erred in overruling the defendant's motion in arrest of judgment. The particular point made is, as we understand it, that no count of the declaration charges the defendant with notice or knowledge prior to the time of the accident that Captain Cooley was careless, reckless, incompetent, or unskillful in the management and operation of his steam vessel. As already seen, and as said by counsel, the first and third counts of the declaration, which proceed upon the theory that the defendant is liable for the negligence of Captain Cooley, ⁴⁸⁹ treating him as a vice-principal, are eliminated from consideration by the finding of the jury that the plaintiff and Cooley were fellow-servants. And the recovery, if sustained at all, must be predicated upon the second count. The charge there is, as already seen, that it was the duty of the defendant to employ a prudent and competent captain for said steam propeller, but that defendant, disregarding its duty in that behalf, employed said Cooley, "who was then and there an incompetent, imprudent, reckless, and unfit person for such position, which fact was then and there wholly unknown to the plaintiff," etc.; and that by reason, etc., the plaintiff, while in the exercise of due and ordinary care, etc., was injured. If it be conceded that an allegation of knowledge on the part of the defendant of the character and habit of the captain, or of the evidentiary facts charging it with such knowledge, was necessary in the declaration, the declaration is nevertheless good after verdict. "This objection is not that that which is attempted to be stated is not a cause of action, but that a cause of action is defectively stated, and that cannot be urged on motion in arrest of judgment": *Matson v. Swanson*, 131 Ill. 255, and authorities cited.

Finding no substantial error in this record the judgment of the appellate court is affirmed.

MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF INCOMPETENT FELLOW-SERVANT.—A servant may recover damages for the negligence of a fellow-servant if the latter was unskilled and incompetent to discharge his duties, and this was known to the master, or could have been known by

took judgment by confession on a promissory note, executed to him by the co-operative association while he was one of its directors. Two days later Leopold J. Kadish, as a stockholder, filed his bill, in the circuit court of Cook county, for the purpose of winding up the affairs of the corporation, making the loan and building association and Albert Florus parties defendant. The loan and building association filed a cross-bill to foreclose the trust deeds held by it, as above stated, claiming priority over the general creditors of the corporation, and the circuit court decreed accordingly. The mortgaged property having sold for less than the amount found due, a deficiency decree was entered against the said guarantors, who had been made parties to the cross-bill, and they, together with Florus, appealed, first to the appellate court, and now to this.

Albert Florus insists that the circuit court erred in holding the trust deeds in favor of the loan and building association valid prior liens to his judgment, and the other appellants, ⁵³⁵ that it erred in holding them liable on the deficiency decree as guarantors. In support of both of these contentions, it is claimed that the trust deeds sought to be foreclosed were void, because taken in violation of our statute, authorizing the organization of "homestead loan associations." This position is based upon the following propositions:

1. The loan to the Kadishes was, in fact, a loan to the Pilsen company, and, therefore, it, as well as the five thousand dollar loan to the co-operative association, was to a corporation. But loans can only be made, under the statute, by homestead loan associations to members, and, as one corporation can not become a member of another, neither the Pilsen company nor the co-operative association could become members of the loan and building association.

2. Both loans were for general business purposes; whereas, homestead loan associations in this state can only lawfully loan money to build homes.

In our view of the law applicable to this case all that is here claimed may be conceded, and still the trust deeds in question would not be void. There was in the transactions of loaning money to the corporations and taking those trust deeds to secure the repayment of the same no violation of the express provisions of the statute regulating the loaning of money by homestead loan associations. The only sections

of that act bearing upon the question are in the following language:

"SEC. 7. Married women may become subscribers to the capital stock of such association, and hold, control, and transfer their stock in all respects as *femes sole*, and their stock shall not be subject to the control of or liable for the debts of their husbands. Minors may become subscribers to and owners of the stock of such associations by guardian or trustee, and such guardian or trustee may withdraw the stock of such minor, as provided in section 6 of this act; *provided*, ⁵³⁶ *however*, that such guardian or trustee shall have given bonds to the probate court in double the amount of the withdrawal value of such stock, for the use of such minor, on his or her becoming of age; but it is hereby provided that no person, as owner or legal representative of the stock of such association, shall, by himself or by proxy, vote at any election when the stockholders are called upon to vote on more than forty shares of stock": 1 Starr and Curtis' Ann. Stats., c. 32, par. 74, p. 631.

"SEC. 8. The board of directors shall hold such stated meetings, not less frequently than once each month, as may be provided by the by-laws, at which the money in the treasury, if one hundred dollars or more, shall be offered for loan in open meeting; and the stockholder who shall bid the highest premium for the preference or priority of loan shall be entitled to receive a loan of one hundred dollars, less the premium bid, for each share of stock held by said stockholder; *provided*, that no loan shall be made by said corporation except to its own members, nor in any sum in excess of the amount of stock held by such members borrowing; *and*, *provided*, that such stockholder may borrow such fractional part of one hundred dollars as the by-laws may provide. Good and ample real estate security, unincumbered, except by prior loans of such association, shall be given by the borrower, to secure the repayment of the loan; *provided, however*, that the stock of such association may be received as security to the amount of the withdrawal value of such stock."

It is not denied that these loans were made to actual members. All that is insisted upon in that regard is that the borrowers, though in fact members, were not legally so, because ineligible to membership. That being admitted, the question still remains, Can the borrowers, being themselves

parties to the illegal acts attempted to be set up here, escape liability upon their contracts to repay the money to the lender? There is, as above shown, no prohibition in the statute against corporations becoming members of homestead loan associations for the purpose of ⁵²⁷ borrowing money; neither is there any prohibition therein against loaning money for other than building purposes. In other words, the transactions were, at most, *ultra vires* in the commonly understood sense of those words, and nothing more.

As said in *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504, cited with approval by this court in *Darst v. Gale*, 83 Ill. 141, "the acts were not immoral in themselves or forbidden by any statute, neither *mala in se* or *mala prohibita*, so as to make the contract illegal and incapable of being the foundation of an action, such a contract as the law will not recognize or enforce, but applying the maxim, *ex facto illicito non orator actio*, leaves the parties as it found them." It is also said in that case: "When acts of corporations are spoken of as *ultra vires* it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the power conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the object for which the corporation was created. . . . It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires*, when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance of the contract. . . . The same rule holds *e converso*.

If the other party has had the benefit of the contract fully performed by the corporation he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation": Citing the authorities.

So this court said in *Bloomington Mut. Benefit Assn. v. Blue*, 120 Ill. 128, 60 Am. Rep. 558: "It will be observed that the contract involved is not absolutely prohibited by statute; all that can properly be claimed is, that it was not expressly authorized by the ⁵²⁸ statute. The defendant voluntarily issued the policy. It received the premium, and Bailey fully, so far as appears, performed all that his contract required him to. So far as he is concerned the contract is an exe-

cuted one. Now, upon the death of Bailey, when the defendant is called upon to perform its part of the contract, can it refuse and defeat a recovery by claiming that the contract is *ultra vires*?"

The question was answered in the negative, on the authority of *Bradley v. Ballard*, 55 Ill. 415; 8 Am. Rep. 656; *Darst v. Gale*, 83 Ill. 136; 2 Morawetz on Corporations, 689. While a contract *ultra vires* remains executory courts will interfere to prevent its enforcement, or, on the application of a shareholder or other authorized persons, prevent its execution, but when it has been carried into effect, and the corporation has received the benefit of it, it cannot plead the excess of its power in discharge of its liability: *Bradley v. Ballard*, 55 Ill. 415; 8 Am. Rep. 656. And "if the other party has had the benefit of a contract fully performed by the corporation he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation": *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; 20 Am. Rep. 504. For a full discussion of this doctrine, see 2 Beach on Private Corporations, sec. 425, et seq.

The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong: 2 Beach on Private Corporations, sec. 425, et seq. See, also, *Carson City Sav. Bank v. Carson City Elevator Co.*, 90 Mich. 550; 30 Am. St. Rep. 454; *Holmes etc. Mfg. Co. v. Holmes etc. Metal Co.*, 127 N. Y. 252; 24 Am St. Rep. 448. All the decisions on this question naturally rest upon the rule "that where a party has accepted and made his own the benefit of a contract, he has estopped himself from denying, in the courts, the validity of the instrument by which those benefits came to him": 2 Parsons on Contracts, 790.

⁵³⁹ Had the contracts been void, and not merely *ultra vires*, *Penn v. Bornman*, 102 Ill. 523, and cases there cited, would have supported the position of appellants, but as the case is presented they have no application.

If, then, the question was between the original parties to the loans, there would seem to be no doubt as to the correctness of the decree of the circuit court. Are either of these appellants in a position to urge the defense of *ultra vires* on behalf of the Pilsen brewing company or the Chicago co-operative brewing association, these companies themselves not

being in a position to have done so? Albert Florus contracted his debt, and the other appellants their liabilities as guarantors, chargeable with constructive notice of the rights of the loan and building association against the property of the brewing association, by the record of the trust deeds, and also with actual notice, by reason of their official positions in the brewing companies. No fraud, in fact, is alleged or attempted to be proved in the making of the loans. The money was actually loaned, and the borrowers had the full benefit of it. There is nothing in the record tending to show that appellants were injured or misled to their prejudice by the transactions. The contracts being enforceable between the parties thereto cannot be avoided by them.

On the point that the decree of foreclosure is too large, the argument proceeds upon the assumption that, in an action upon a contract *ultra vires* for money loaned, the lender can only recover the sum actually borrowed, and therefore, in this case, the borrowers were entitled to credits for interest and dues paid. We are aware of no such rule of law. The contract, if enforceable at all, is to be enforced as the parties made it, and its terms and provisions must govern their rights. If void, then, of course, no recovery whatever can be had upon it.

The questions as to whether, under a proper construction of our statute, corporations for manufacturing purposes ⁵⁴⁹ should be allowed to become members of homestead loan associations, and whether such associations should be allowed to loan money for general business purposes, are very important ones, but the decision of them not being necessary to the determination of this case, we have purposely avoided deciding them. The judgment below will be affirmed.

CORPORATIONS—ULTRA VIRES ACTS.—Contracts of corporations are *ultra vires* when they involve adventures or undertakings outside of the scope of the powers given by their charters: *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482; *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319, and note. To the same effect, see *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; 99 Am. Dec. 300, and note; and with the doctrine of the foregoing cases compare *Franklin Co. v. Lewiston Institution*, 68 Me. 43; 28 Am. Rep. 9, and note.

CORPORATIONS—ULTRA VIRES—WHEN NOT AVAILABLE AS A DEFENSE.—The plea of *ultra vires* cannot be availed of to defend against an obligation incurred when the contract has in good faith been performed by the other contracting party, and the benefit received by the party urging the plea: *Linkauf v. Lombard*, 137 N. Y. 417; 33 Am. St. Rep. 743, and note, with the

cases collected. The defense of *ultra vires* is looked upon with disfavor by the courts when it is presented for the purpose of avoiding an obligation assumed by a corporation merely in excess of the powers conferred upon it, and not in violation of an express provision of the statute: *Kennedy v. California Sav. Bank*, 101 Cal. 495; 40 Am. St. Rep. 69, and note. See, also, the extended notes to *Central R. R. etc. Co. v. Smith*, 52 Am. Rep. 358, and *New York etc. Ins. Co. v. Ely*, 13 Am. Dec. 108.

CORPORATIONS—ULTRA VIRES—ESTOPPEL.—The plea of *ultra vires* should not prevail, as a general rule, when it would not advance justice, but, on the other hand, would accomplish a legal wrong: *Carson City Sav. Bank v. Carson City Elevator Co.* 90 Mich. 550; 30 Am. St. Rep. 454, and note; *Holmes etc. Mfg. Co. v. Holmes etc. Metal Co.*, 127 N. Y. 252; 24 Am. St. Rep. 448, and note.

CORPORATIONS—ULTRA VIRES—ENFORCEMENT OF.—A contract *ultra vires*, while it remains executory, cannot be enforced: *Sherman Center Town Co. v. Morris*, 43 Kan. 282; 19 Am. St. Rep. 134. While an *ultra vires* contract remains executory neither party is estopped to assert its invalidity: *Long v. Georgia Pac. Ry. Co.*, 91 Ala. 519; 24 Am. St. Rep. 931, and note. An *ultra vires* contract is not enforceable in equity: *Garrett v. Kansas City etc. Min. Co.*, 113 Mo. 330; 35 Am. St. Rep. 713; *Greenville Compress etc. Co. v. Planters' Compress etc. Co.*, 70 Miss. 669; 35 Am. St. Rep. 681. See, also, the note to *Carson City Sav. Bank v. Carson City Elevator Co.*, 30 Am. St. Rep. 453.

COBB v. OLDFIELD.

[151 ILLINOIS, 540.]

DOWER—BURDEN OF PROOF.—To entitle a widow to recover dower the burden of proof is on her to show that her deceased husband, during coverture, was seised of a legal or equitable estate of inheritance in the land.

ESTOPPEL BY DEED.—A party claiming under a deed is estopped from denying any of the material recitals therein, however contrary to the truth, but such estoppel does not apply to or bind those claiming adversely, or to parties claiming by title acquired anterior to the date of the deed which, it is claimed, creates the estoppel.

ESTOPPEL BY DEED.—It is only when a party is claiming title under a deed that he is estopped by its recitals, and if he buys in an outstanding title, he may show that the grantors in the deed did not have the title, and that he holds under a different title which is paramount.

Snapp and Arnold, for the appellant.

I. W. and C. C. Buell, for the appellees.

540 SHOPE, J. Appellant filed her bill for the assignment of dower in certain lots in Wilson's Addition to the city of Chicago, as widow of Zenas Cobb, deceased. The court, on hearing, dismissed the bill. To entitle appellant to recover, the 541 burden was upon her to show that her husband

during coverture, was seised of a legal or an equitable estate of inheritance in the land. This she has failed to do, and hence the court correctly decreed dismissing her bill, unless appellees are estopped by deed from controverting her title.

We recognize the rule of law, so frequently applied in this court, that a party claiming under a deed cannot be permitted to deny any of the material recitals therein, however contrary to the truth: *Byrne v. Morehouse*, 22 Ill. 605; *Kruse v. Wilson*, 79 Ill. 239; *Rigg v. Cook*, 4 Gilm. 336; 46 Am. Dec. 462; *Orthwein v. Thomas*, 127 Ill. 561; 11 Am. St. Rep. 159. But that principle can have no application in this case. The fact that one of the grantors in appellees' chain of title, who had for many years claimed title adversely to Cobb, accepted a quitclaim deed from Cobb to the land, under which it is not shown he entered or claimed title, will not conclude appellees, his remote grantees, from showing the facts. Indeed, on April 11, 1865, when Cobb quitclaimed the land to Wright, appellees' remote grantor, Wright, had sold and conveyed the land in controversy by warranty deeds; one-third to De Wolf, one-third to Stebbins, and, by quitclaim deed, one-third to Lowry. The deed to De Wolf was acknowledged and recorded January 13, 1854, that to Stebbins, March 12-23, 1853, and to Lowry, December 3-11, 1856. De Wolf, under whom appellees claim title, subsequently to the conveyances by Wright, acquired the title of Stebbins and Lowry. It therefore appears, if it be assumed that Wright accepted the quitclaim deed from Cobb, April 11, 1865, he then claimed no title to the land in controversy, and appellees claim nothing from, through, or under him, since the making and acceptance of said deed. The estoppel cannot apply or bind those claiming adversely, or to persons claiming from the same party by title acquired anterior to the date of the deed which, it is claimed, creates the estoppel: *Carrer v. Jackson*, 4 Pet. 83. It is only when the party is claiming title under the deed that he will ⁵⁴² be estopped by its recitals. And we have accordingly held that where one claiming land buys in an outstanding claim of title, he may show that the grantors in the deed did not have the title, and that he holds under a different title which is paramount: *Owen v. Robbins*, 19 Ill. 555. And the cases are there distinguished from those arising between landlord and tenant, vendor and vendee, which would not, it is said, fall within the rule there announced: *Rawle on Covenants for Title*, 3d ed., 463, 464.

We need not repeat the reasoning of the case cited; it is applicable here, and conclusive of the question of estoppel under the facts here shown. We are of opinion the court below decided correctly, and its decree will be affirmed.

DOWER—NECESSITY FOR SEIZED IN HUSBAND.—To entitle a widow to dower, her husband must in his lifetime have been seised of a present estate in possession in the premises: *Safford v. Safford*, 7 Paige, 259; 32 Am. Dec. 633.

ESTOPPEL BY DEED AS TO GRANTEE.—The recitals in a deed operate by way of estoppel upon the grantee where they are material to the contract: *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159; *Thompson v. Thompson*, 19 Me. 235; 36 Am. Dec. 751; *Osborne v. Endicott*, 6 Cal. 149; 65 Am. Dec. 498, and notes, with the cases collected. To the same effect, see *Hanly v. Blackford*, 1 Dana, 1; 25 Am. Dec. 114, and *Den v. Chaffin*, 3 Dev. 108; 22 Am. Dec. 711, and note. See, also, the notes to *Graff v. Castleman*, 16 Am. Dec. 754, and *Greene v. Couse*, 24 Am. St. Rep. 462.

KEITHLEY v. WOOD.

[151 ILLINOIS, 566.]

MORTGAGES—DEED ABSOLUTE MAY BE SHOWN TO BE—EVIDENCE NECESSARY.

When land is conveyed in fee by a deed with covenants of warranty, and there is no condition or defeasance either in the deed or in a collateral paper, and parol evidence is resorted to for the purpose of establishing that the deed was given as a mortgage, such evidence must be clear and convincing; otherwise the presumption that the deed is what it purports upon its face to be must prevail.

MORTGAGE—DEED, WHEN IS.—When a conveyance is by deed with a defeasance in a collateral paper, or a contract for a resale, and the evidence leaves it in doubt whether the transaction is intended as a conditional sale or a mortgage, it is, as a general rule, treated as a mortgage.

MORTGAGES—DEED AND AGREEMENT TO RECONVEY.—In case of a warranty deed and agreement to reconvey, the character of the deed must be determined by the intention of the parties, clearly and satisfactorily proved, and any doubt as to the intention is resolved in favor of the construction that the conveyance is a security for a debt.

MORTGAGE—DEED, WHEN IS.—If an indebtedness or liability exists between the parties, either arising from a debt existing prior to a conveyance by deed absolute, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is not discharged or satisfied by the conveyance, and the grantor is regarded as still owing, and bound to pay it at some future day, so that the payment stipulated for in an agreement to reconvey is in reality the payment of such subsisting debt, the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments. On the contrary, if no such relation whatsoever of debtor and creditor is left sub-

sisting, then the transaction is not a mortgage, but a mere sale and contract of repurchase.

MORTGAGES—DEEDS MAY BE SHOWN TO BE.—Whether a deed and an agreement to resell are to be regarded as an absolute sale, or as a mortgage, depends upon the existing facts and circumstances which led to their execution, and not upon the form the parties gave the transaction, and such facts and circumstances may be proved by parol evidence, not for the purpose of contradicting the deed, but to raise an equity paramount to its terms and conditions.

BILL in equity by C. C. Wood and Kate, his wife, against A. Keithley, to redeem from an alleged mortgage executed November 1, 1889. On July 13, 1889, Wood borrowed of Keithley four hundred and thirty dollars, giving his judgment note therefor, secured by mortgage executed by himself and wife upon the land in dispute. In August, 1889, Wood borrowed an additional one hundred dollars from Keithley, giving his judgment note therefor. On September 17, 1889, Keithley caused judgment to be entered on the said notes for five hundred and sixty-six dollars and fifty cents. The judgment was not paid on November 1, 1889, when Wood applied to Keithley for a further loan and received an additional four hundred dollars. On the same day Wood and wife executed and delivered to Keithley a warranty deed to the land in controversy, and took an agreement from the latter to reconvey the premises to them upon their payment to him of nine hundred and thirty-seven dollars and fifty cents before December 31, 1889; otherwise the agreement to be void after that date. Judgment for plaintiffs, and defendant appealed.

J. A. Cameron, for the appellant.

Jack & Tichenor, for the appellees.

571 **CRAIG, J.** When this case was first submitted we were inclined to hold that the decree of the circuit court, and the judgment **572** of the appellate court were erroneous, and a judgment of reversal was entered, but, upon the petition of complainant, a rehearing was ordered, and, upon a further examination of the case, we have arrived at a different conclusion. At the time the deed and agreement were executed no one was present but Wood and his wife and Keithley. They, and they alone, are the persons who know the facts under which the deed and contract were executed. Rejecting the testimony of Mrs. Wood, on the ground that she being the wife of the complainant is disqualified as a witness, we have complainant and defendant as the only witnesses testi-

fying to the nature and character of the transaction. Wood testified in substance that he borrowed of Keithley a certain amount of money in addition to the amount of the judgment Keithley held against him, and that the deed and agreement were executed as a mortgage to secure the payment of the amount agreed to be due, nine hundred and thirty-seven dollars and fifty cents, and that a sale of the land was not made. On the other hand Keithley testified that he purchased the land, paying therefor the amount named in the contract which was made up of the judgment he held against Wood, and the balance in money which he paid at the time; that the agreement was given which authorized Wood to repurchase, as provided by its terms, and that the transaction was not a loan. It is thus seen that the testimony of the two parties, in regard to the matter in dispute, whether the transaction was intended as a loan or a sale and resale, is irreconcilable. Where land is conveyed in fee by a deed with covenants of warranty, and there is no condition or defeasance either in the deed or in a collateral paper, and parol evidence is resorted to for the purpose of establishing that the deed was given as a mortgage, such evidence must be clear and convincing, otherwise the presumption that the deed is what it purports upon its face to be must always prevail. This principle is well established. In *Coyle v. Davis*, 116 U. S. 108, in discussing the question, the court said: "The conveyance ⁵⁷² to Davis of the undivided one-third of Coyle, being to him, his heirs and assigns forever, with a covenant of warranty, and without a defeasance either in the conveyance or in a collateral paper, the parol evidence that it was to operate only as a mortgage must be clear and convincing, or the presumption that the deed is what it purports to be must prevail."

So, in the case of *Cadman v. Peter*, 118 U. S. 73, the court said: "If the conveyance is in fee, with a covenant of warranty, and there is no defeasance either in the conveyance or in a collateral paper, parol evidence that it was given to operate as a mortgage must be clear and convincing."

But where there is a conveyance by deed and a defeasance in a collateral paper, or a contract for a resale, and the evidence leaves it in doubt whether the transaction was intended as a conditional sale or a mortgage, it will, as a general rule, be treated as a mortgage.

In *Cosby v. Buchanan*, 81 Ala. 574, there was a deed and

an agreement to reconvey, as is the case here. The court said: "The character of the deed must be determined by the intention of the parties, clearly and satisfactorily proved. When it is absolute, and only parol evidence is relied on, the party affirming that the conveyance was intended as a security for a debt must show that such was the intention by clear and convincing evidence. But when it is admitted or shown by a separate written instrument that the transaction is not an unconditional sale, as the deed imports, but either a mortgage or sale with right to repurchase, the court, in the interest of complete justice, is inclined to construe the transaction as a mortgage. Any doubt as to the intention will be resolved in favor of the construction that the conveyance is a security for a debt": Citing *Mitchell v. Wellman*, 80 Ala. 16. See, also, *Turner v. Wilkinson*, 72 Ala. 361, and *McNeil v. Norsworthy*, 39 Ala. 156.

⁵⁷⁴ In *Russell v. Southard*, 12 How. 145, where there was an absolute deed and an agreement to resell upon the payment of a specified amount at a certain time, on a bill to redeem, the court held the transaction to be a mortgage. In the decision of the case the court said: "It is not to be forgotten that the same language which truly describes a real sale may also be employed to cut off the right of redemption in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids, and that, in doubtful cases, the court leans to the conclusion that the reality was a mortgage and not a sale": Citing, in support of what is said, *Conway v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 2 Sumn. 533; *Secrest v. Turner*, 2 J. J. Marsh. 471; *Edrington v. Harper*, 3 J. J. Marsh. 354; 20 Am. Dec. 145; *Crane v. Bonnell*, 2 N. J. Eq. 264; *Robertson v. Campbell*, 2 Call. 421; *Poindexter v. McCannon*, 1 Dev. Eq. 373; 18 Am. Dec. 591.

In the case first cited, Chief Justice Marshall, in delivering the opinion of the court, in plain terms declared that doubtful cases have generally been decided to be mortgages: See, also, *Peugh v. Davis*, 96 U. S. 332, and *Brick v. Brick*, 98 U. S. 514.

In Jones on Mortgages, section 279, the author says: "When it is doubtful whether the transaction is a mortgage or a conditional sale it will generally be treated as a mortgage, although it is, in some of the cases, said that the transaction

appearing upon its face to be a conditional sale, will be held to be such when no circumstances appear showing an intention that it should be considered a mortgage. But generally courts of equity incline against conditional sales, and give the benefit of any doubt arising upon the evidence in favor of the grantor's right to redeem": See, also, sec. 278.

In *O'Neill v. Capelle*, 62 Mo. 202, where there was a deed and a contract to resell, the court held, where the matter ⁵⁷⁵ was in doubt, the doubt would be thrown in favor of the theory of a mortgage.

Trucks v. Lindsey, 18 Iowa, 504, is a case in point. It is there said: "A resort, however, to a formal conditional sale, as a device to defeat the equity of redemption, will, of course, be unavailing for that purpose. And the possibility of such resort, together with other considerations, has driven courts of equity to adopt as a rule, that, when it is doubtful whether the transaction is a conditional sale or a mortgage, it will be held to be the latter."

In *Rockwell v. Humphrey*, 57 Wis. 412, the same doctrine is announced.

The supreme court of Virginia, in *Snavely v. Pickle*, 29 Gratt. 27, in discussing the question, said: "There is a well-defined distinction between a mortgage and a conditional sale, but it is often very difficult to determine whether a particular transaction amounts to one or the other; and, after all, each case must be determined on its own circumstances, and in doubtful cases the courts incline to construe the transaction to be a mortgage rather than a conditional sale."

Substantially the same rule has been adopted in the following cases: *Holton v. Meighen*, 15 Minn. 69; *Rich v. Doane*, 35 Vt. 125; *Bacon v. Brown*, 19 Conn. 29; *Klein v. McNamara*, 54 Miss. 90.

In Pomeroy's Equity Jurisprudence, section 1194, the author lays down the rule, where there is a conveyance with an agreement to repurchase, the two papers taken together may be what on their face they purport to be—a mere sale with a contract to repurchase—or they may constitute a mortgage.

In section 1195 it is said: "A general criterion, however, has been established by an overwhelming consensus of authorities, which furnishes a sufficient test in the great majority of cases; and, whenever the application of this test still leaves a doubt, the American courts, from obvious ⁵⁷⁶

motives of policy, have generally leaned in favor of the mortgage. This criterion is the continued existence of a debt or liability between the parties, so that the conveyance is in reality intended as a security for the debt, or indemnity against the liability. If there is an indebtedness or liability between the parties, either a debt existing prior to the conveyance, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is still left subsisting, not being discharged or satisfied by the conveyance, but the grantor is regarded as still owing, and bound to pay it at some future time, so that the payment stipulated for in the agreement to reconvey is in reality the payment of this existing debt, then the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments. On the contrary, if no such relation whatsoever of debtor and creditor is left subsisting, then the transaction is not a mortgage, but a mere sale and a contract of repurchase." The principle announced by the author was sanctioned by this court in *Rue v. Dole*, 107 Ill. 275, and the transaction there involved was held not to be a mortgage. But there is a clear distinction between that case and this one.

Here, it is true that the five hundred and sixty-six dollars and fifty cents judgment held by appellant against Wood, and the mortgage previously given to secure the notes upon which judgment had been entered, were canceled, but after the execution of the warranty deed and the agreement to reconvey, was there no debt existing? While the debt assumed a new form when all the facts and circumstances are considered, we do not think it was paid and discharged, but, on the other hand, it was enlarged by appellant advancing an additional sum, increasing the amount from five hundred and sixty-six dollars and fifty cents to nine hundred and thirty-seven dollars and fifty cents. The appellant himself testified: "When I handed him the deed to read it over, he said, 'This is a warranty deed, and you agreed to give me an agreement back,' and I said, 'Yes, I will, but I can't draw them both at once.'" If Wood had sold the land to appellant, and the transaction was a sale and not a mortgage, why should Wood object to a warranty deed. After appellant had receipted the indebtedness, and paid over the additional sum advanced to Wood, he testified that the following occurred:

I said, "Chauncey, now this is a matter of business, and you must look out for yourself. This contract means just what it says, that you have got to pay me back this money within that time or you will not get any chance to pay it back afterwards—the property is mine." He said, "Don't you worry a bit about that. You will get your money a long time before it is due." I said, "Very well."

It is apparent from this conversation that the parties both understood that there was a debt existing, one insisting that the money should be paid back on a specified date, the other affirming it would be paid before due.

Again, appellant testified that Wood came to his office on December 31st, and said, "I am not able to pay you back that money to-day." I said, "Chauncey, this is the last day, the money is due, and you know what I told you when you took it." He said, "Well, I know that, but I did not sell the thirty acres." And he says, "I want a little more time."

Appellant also testified that Wood, referring to the thirty-acre tract, said, "Your option expires on the 10th of January"; he says, "Now give me a chance to rebuy the interest in the home place until that option expires." I said, "Well, I will do it; but now, Chauncey, I will tell you for the last time that you get no further extensions out of me. You are not in the habit of paying your debts very promptly, and I have been a little easy with you, but this is a finality; you will get no further extensions."

If no debt existed, what did appellant mean when he said, "The money is due; you know what I told you when you took it. I will extend the time, but you will get no further extensions"? There is another fact which indicates that the parties did not regard the transaction a sale. Wood owned only one-seventh of the one hundred and twenty acre tract of land, and that interest was subject to the dower interest of his mother, and yet the deed executed to appellant was a general warranty, purporting to convey the entire one hundred and twenty acre tract. If the deed was but a mortgage to secure the repayment of a small amount of money, which was expected to be repaid in a short time, Wood might well conclude that it was not necessary to be particular about describing the land accurately. On the other hand, if he was selling his undivided one-seventh interest, it is unreasonable to believe that he would be willing to

execute a deed conveying lands that he never owned, where he could be held liable at once on his covenants of title. Whether a deed and an agreement to resell, like those in question, are to be regarded as an absolute sale, or as a mortgage, depends upon the existing facts and circumstances which led to their execution, and not upon the form the parties saw proper to give the transaction. Hence the facts and circumstances surrounding the transaction may be proved by parol evidence, not for the purpose of contradicting the deed, but for the purpose of raising an equity paramount to its terms and conditions: *Carter v. Carter*, 5 Tex. 93; *Purviance v. Holt*, 8 Ill. 394. Here Wood testified that the transaction was a loan, and the deed executed as security. And we are inclined to the opinion that the facts and circumstances tend to establish the correctness of his version of the transaction. But even if the matter was left in doubt, which is as favorable a view as can, under all the facts, be taken of the question under the rules of law established by the authorities, the court would be compelled to hold that the deed was a mortgage. The judgment of the appellate court will be affirmed.

MORTGAGE—EVIDENCE TO CONVERT DEED ABSOLUTE INTO.—The fact that an absolute conveyance was intended as a mortgage must be established by a clear preponderance of evidence; or, in other words, the proof of the fact must be clear of reasonable doubt: *Winston v. Burnell*, 44 Kan. 367; 21 Am. St. Rep. 289, and note; *Mahoney v. Bostwick*, 96 Cal. 53; 31 Am. St. Rep. 175, and note; *Perot v. Cooper*, 17 Col. 80; 31 Am. St. Rep. 258, and note; *Adams v. Pilcher*, 92 Ala. 474.

MORTGAGE—DEED ABSOLUTE, WITH DEFEASANCE AS.—A deed absolute and a defeasance executed at the same time constitute a mortgage: *Friedley v. Hamilton*, 17 Serg. & R. 70; 17 Am. Dec. 688, and note at page 304; *Edrington v. Harper*, 3 J. J. Marsh. 353; 20 Am. Dec. 145; *Youle v. Richards*, 1 N. J. Ch. 534; 23 Am. Dec. 722, and note; *Perkins v. Dibble*, 10 Ohio, 433; 36 Am. Dec. 97; *Manufacturers' etc. Bank v. Bank*, 7 Watts & S. 335; 42 Am. Dec. 240, and note; *Baker v. Fireman's Fund Ins. Co.*, 79 Cal. 34; *Cook v. Bartholomew*, 60 Conn. 24; *Meigs v. McFarlan*, 72 Mich. 194. See, also, the note to *Marston v. Williams*, 22 Am. St. Rep. 724.

MORTGAGES—DEED WITH AGREEMENT TO RECONVEY AS.—A deed absolute with a bond to reconvey upon repayment of the purchase money constitute a mortgage: *Harbison v. Lemon*, 3 Blackf. 51; 23 Am. Dec. 376; *Erskine v. Townsend*, 2 Mass. 493; 3 Am. Dec. 71; *McLaughlin v. Shepherd*, 32 Me. 143; 52 Am. Dec. 646, and note; *Baxter v. Dear*, 24 Tex. 17; 76 Am. Dec. 89. See the note to *Chase's case*, 17 Am. Dec. 300.

MORTGAGE.—IF A DEED IS TAKEN FROM A DEBTOR WHOSE DEBT IS NOT SURRENDERED, canceled, or otherwise discharged, it must be regarded as a mortgage: *Wallace v. Smith*, 155 Pa. St. 78; 35 Am. St. Rep. 868, and note.

MORTGAGES.—WHERE IT IS DOUBTFUL whether a transaction was intended as a mortgage or a conditional sale courts of equity incline to treat it as a mortgage: *Poindexter v. McCannon*, 1 Dev. Eq. 373; 18 Am. Dec. 591, and note; *Edrington v. Harper*, 3 J. J. Marsh. 353; 20 Am. Dec. 145.

MORTGAGES, WHETHER OR DEED—INTENT OF PARTIES.—The character of the instrument is to be determined from the intent of the parties ascertained from the circumstances of the case: *Gray v. Shelby*, 83 Tex. 405; *Hodge v. Weeks*, 31 S. O. 276; *Bennet v. Holt*, 2 Yerg. 6; 24 Am. Dec. 455; *Hickman v. Cantrell*, 9 Yerg. 172; 30 Am. Dec. 396, and note.

AM. ST. REP., VOL. XLII.—18

CASES
IN THE
SUPREME COURT
OF
KANSAS.

STATE v. FRAZIER.

[53 KANSAS, 87.]

RAPE—ATTEMPT TO COMMIT—CONVICTION FOR.—Under an information charging rape the defendant may be convicted of an attempt to commit that offense.

RAPE—ATTEMPT TO COMMIT—REQUIREMENT OF INFORMATION.—An averment in an information charging the specific offense of an attempt to commit rape must set forth the acts done toward the commission of the offense.

RAPE—ATTEMPT TO COMMIT—SUFFICIENCY OF INFORMATION—MOTION TO QUASH.—In an information charging an attempt to commit rape an allegation that the defendant "unlawfully and feloniously did attempt to commit a rape, by then and there attempting to carnally know the said Y.," does not set forth any physical act done towards the commission of the offense. The information is therefore insufficient as against a motion to quash.

INFORMATION CHARGING RAPE AND ATTEMPT TO COMMIT RAPE—VERDICT—EFFECT OF.—Where an information contains two counts, the first charging rape, the second an attempt to commit rape, and the jury find that the defendant is not guilty as charged in the first count, but that he is guilty as charged in the second count, all parts of the verdict must be considered in interpreting it; and when thus considered it is plain that the jury intended to acquit only of the crime of rape, and did not intend to acquit of the attempt to commit rape. The defendant is, therefore, not entitled to an absolute discharge because of the finding upon the first count.

David Ritchie, for the appellant.

John T. Little, attorney general, and *R. A. Lovitt*, county attorney, for the state.

39 JOHNSTON, J. George W. Frazier was convicted of an attempt to commit rape upon a female under the age of

eighteen years. The information contained two counts, in the first of which it was alleged, that "On the fourteenth day of April, 1893, in the said county of Saline, and the state of Kansas, one George W. Frazier, then and there, in and upon one Anna Yust, a female under the age of eighteen years, to wit, of the age of thirteen years, then and there being, unlawfully and feloniously did commit a rape, by then and there carnally and unlawfully knowing her, the said Anna Yust." The second count charged that "On the fourteenth day of April, 1893, in the said county of Saline and state of Kansas, one George W. Frazier, then and there, in and upon one Anna Yust, a female under the age of eighteen years, to wit, of the age of thirteen years, then and there being, unlawfully and feloniously did attempt to commit a rape, by then and there attempting to carnally and unlawfully know the said Anna Yust," etc. The sufficiency of the information was challenged by motion to quash, and as to the second count, it was alleged that the charge was indefinite, uncertain, and insufficient. The court denied the motion, and the trial proceeded before a jury. Two verdicts were returned, in one of which the jury found that the defendant was "not guilty as charged in the first count of the information," and in the other it was found that the defendant was "guilty as charged in the second count of the information."

The acquittal upon the first count leaves no question as to its sufficiency, but the defendant insists that the second count fails to properly charge an attempt at the commission of rape, and that, therefore, the motion to quash should have been sustained. The prosecutor appears to have been in doubt whether the unlawful conduct of the defendant ⁹⁰ amounted to the consummated offense of rape, or only to an unsuccessful attempt at that offense, and he seems to have deemed it necessary to set forth both charges in two counts in order to meet the exigencies that might arise from the proof. While an attempt to commit rape is a distinct offense, a separate count charging such attempt was not essential. Our criminal code, section 121, provides that, "Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any degree inferior thereto, or of an attempt to commit the offense": *State v. Decker*, 36 Kan. 717. Although the second count was not absolutely necessary, it hardly affords the defendant any ground for complaint. It was

notice to him that, in case the prosecution failed to establish the principal offense, it would endeavor to procure a conviction of an attempt. No motion was made by the defendant to require the state to elect upon which count it would proceed to trial, and, in fact, parties, counsel, and court all appear to have proceeded upon the theory that the charging of two offenses in two separate counts was proper and necessary. The case having been tried upon this theory, and there having been an acquittal upon the first count, it becomes important to inquire as to the sufficiency of the second count, upon which the conviction rests. Treating an attempt to commit rape, then, as if it stood alone, we think it must be held to be insufficient as against a motion to quash. It fails to set forth any physical act or acts done toward the commission of the offense. It does allege that the defendant "did attempt to commit rape, by then and there attempting to carnally and unlawfully know the said Anna Yust." The latter part of the clause is nothing more than a repetition, and no more than to say that he attempted to commit rape by attempting to commit rape. To constitute such an attempt, something more than mere intention is necessary, and even more than solicitation. Under the statute relating ⁹¹ to attempts there must be: 1. An intention to commit the crime; and 2. Some direct overt act done toward its commission: Gen. Stats. of 1889, par. 2557; *In re Lloyd*, 51 Kan. 501. The second is an essential element of the offense, and should be specifically set forth in the charge. The physical acts done toward the commission of the offense should be stated in the information or indictment, so that the court may see whether or not the law has been violated, and so the accused may know to what he must make answer. In considering what was necessary to be charged in the indictment for attempt to commit an offense, the supreme court of Illinois stated that "if the averment of a mere attempt was all that is required, the accused could never know what acts would be relied on to prove the attempt, and would be liable to surprise. We are, therefore, clearly of opinion that the acts done by the accused toward the commission of the crime should have been specifically averred, and, for the want of such an averment, the indictment was bad and should have been quashed": *Thompson v. People*, 96 Ill. 161; 2 Bishop's Criminal Procedure, secs. 86, 92. This defect in

the averments of the second count requires a reversal of the judgment.

But the defendant insists that he is entitled to an absolute discharge. He asserts that the first count of the information included the attempt as well as the substantive offense, and he claims that, because there was a finding in his favor on that count, it follows that the jury found him not guilty of the attempt, as well as of the charge of the principal offense. Although the course pursued of setting forth the charge of rape and of an attempt to commit rape in separate counts may not have been the best practice there can be no doubt as to the understanding and purpose of the court and jury. The parties and their counsel, as well as the court and the jury, proceeded upon the theory that the defendant was being tried under the first count of the completed offense of rape, and under the second count for an attempt to commit that offense. The verdict of the jury cannot be misunderstood. It was to the effect that he was not guilty of rape, but was guilty of ^{an} attempt to commit rape. The findings were based upon the same testimony, were returned together, and should be considered together in connection with the theory upon which the case was tried. When so considered, it is plain that the jury only intended to acquit the defendant of rape, and that they did not intend to acquit him of an attempt to commit rape. This was the view taken by this court in the somewhat similar case of *State v. Bowen*, 16 Kan. 475. While there is some dispute in the testimony, it strongly tends to show that the defendant, who was said to be sixty-five years of age, attempted to commit a rape upon a girl about thirteen years of age, and we find little in the case to make us look with favor upon any mere technical objection raised by the defendant.

The judgment of the district court will be reversed and the cause remanded for further proceedings.

ALLEN, J., concurring.

HORTON, C. J., dissenting.

RAPE.—CONVICTION FOR LESSER OFFENSES IN PROSECUTION FOR: See *People v. Abbott*, 97 Mich. 484; 37 Am. St. Rep. 360, and note; *Lewis v. State*, 30 Ala. 54; 68 Am. Dec. 113.

ASSAULT WITH INTENT TO COMMIT RAPE.—INFORMATION FOR IS SUFFICIENT, WHEN: See *State v. Langford*, 45 La. Ann. 1177; 40 Am. St. Rep. 277.

KANSAS CITY, FORT SCOTT, AND MEMPHIS RAILROAD COMPANY v. BERRY.

[58 KANSAS, 112.]

APPEAL—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—REVERSAL OF JUDGMENT—NEW TRIAL.—The supreme court will not reverse the judgment and grant a new trial because there is an apparent preponderance, or even great preponderance, of evidence against the verdict. Disputed questions of fact will not be retried.

RAILROAD COMPANIES—DUTY TO PERSONS NOT PAYING FARE.—One riding on a railroad train merely by permission of its conductor, and without payment of fare, is not entitled to the degree of care for his personal safety due to an ordinary passenger, and in case of injury slight negligence is not sufficient to warrant a recovery against the company.

ACTION by Berry to recover damages for personal injuries. Plaintiff obtained judgment for five hundred dollars, and defendant appealed.

Wallace Pratt and Charles W. Blair, for the plaintiff in error.

Fuller & Randolph and Ed Van Gundy, for the defendant in error.

¹¹⁵ ALLEN, J. This action was brought by Nevada Berry to recover damages for personal injuries sustained by her in getting off of one of the defendant's freight trains. The facts of the case, as shown by the plaintiff's own testimony, are, that she purchased a ticket at Fort Scott to Arcadia, and took passage on a freight train which left Fort Scott at 9 o'clock in the evening, and arrived at Arcadia at 10:20. The train was a long one, consisting of thirty-one cars and a caboose. The train stopped so that the engine was a little way from the depot, ¹¹⁶ and the caboose was outside of the corporate limits, near the end of a cut where it was wet and muddy. The caboose stopped there about five minutes. Then the train started on. The plaintiff came to the door to get off when they got to the yards, as she was accustomed to do. Her version of what happened then is as follows: "The brakeman said, 'All right; do you want to get off'? I said, 'Yes.' He says, 'Well, step to the door.' I says, 'You will help me off in the yards, won't you'? and he says, 'I'll put on the brakes.' He says, 'Can you make it? I will hold a lantern for you.' He turned to set the brake. I turned to see whether he was going to assist me, and he says, 'Step down and hurry up'; and at the same time he turned a brake

as if to set it and kicked it off, and the jumping forward of the caboose threw me off suddenly."

The evidence shows that the plaintiff's knee was badly bruised, and her side, shoulder, and arm hurt. There is no dispute in the evidence as to the fact that the plaintiff had a ticket, but as to what took place between her and the conductor with reference to it the evidence is conflicting. She herself testified that the conductor did not ask her for her ticket, and for that reason she did not give it to him. The conductor and two other witnesses stated that he asked her for her ticket, and she answered, either that she did not have any ticket, or that she did n't have to have any ticket. She in fact neither delivered her ticket nor paid her fare. She testified that she was in the habit of riding on freight trains, and knew that they did not stop at the platforms. She states that while the caboose was stopping in the cut she was not told by any train-hand that she would have to get off there. On the other hand the brakeman and other passengers testified that the brakeman told them that they would have to get off there, and that the plaintiff said she could jump off from the moving train as it pulled up towards the depot.

Counsel for the plaintiff in error argue at some length the proposition that the weight of the evidence is so overwhelmingly in its favor, that this court should reverse the judgment, and grant a new trial, notwithstanding the fact that there is ¹¹⁷ evidence shown by the record to support every fact essential to the plaintiff's recovery. Much stress is laid on the proposition that, in former decisions of this court, it is said that there must be sufficient evidence to uphold the verdict, and it is contended that this court will weigh the evidence, and, where a number of disinterested witnesses contradict the unsupported testimony of an interested party, that this court may grant a new trial solely because of a great preponderance of the evidence in the defendant's favor.

We do not deem it necessary to cite the very numerous cases in which it has been held that, where there is competent evidence fairly supporting every material fact necessary to the plaintiff's cause of action, which the jury has accepted as true, and where their verdict has been approved by the trial court, this court will not reverse the judgment and grant a new trial because there is an apparent preponderance, or even great preponderance, of evidence against the verdict. It is

not for this court to try disputed questions of fact in cases brought here for review.

Complaint is also made of the instructions, and first of the following, which was given at the request of plaintiff's counsel: "If the defendant company, through its trainmen (servants), undertook to carry this plaintiff as a passenger to the town of Arcadia, it was their duty then to stop at the town of Arcadia long enough for her to have a reasonable time to alight from the train, and, of course, that is not stopping somewhere else away from the town of Arcadia."

The last portion of this instruction is criticised, as being unfair and misleading, and, in view of the facts disclosed by the testimony, we think it is somewhat so. There seems to be no question that the place where the train stopped was reasonably near the station at Arcadia, and was near the point where such trains usually stopped. Were this the only question, however, we should be loth to reverse the case on account of the giving of this instruction.

A more serious difficulty arises on the general instructions ¹¹⁸ given by the court. The charge contains the following language: "If plaintiff purchased a ticket on the day mentioned from Fort Scott to Arcadia, and was ready and willing, on demand of the conductor, to deliver it to him, and he permitted her to ride, it makes no difference whether he took up said ticket or not, or, if she had no ticket and offered him none, and he permitted and consented for her to ride from Fort Scott to Arcadia without ordering her off the train, she would be entitled to the rights of a regular passenger."

In the case of *St. Joseph etc. R. R. Co. v. Wheeler*, 35 Kan. 185, it was held that a person on a construction train with the consent of the conductor was not a trespasser, and that the railroad company was bound to exercise ordinary care for his safety, but that it would not be bound to exercise that extraordinary care due to the passengers carried for hire. It will be observed that, in the last clause of the instruction quoted, the jury are told that if the plaintiff rode in the car with the consent of the conductor, she would be entitled to the rights of a regular passenger. By this instruction the court in effect withdrew from the consideration of the jury the conflicting testimony as to what took place between the plaintiff and the conductor with reference to a ticket. They were told in effect that the plaintiff was a regular passenger,

whether her statement was true, or that of the conductor and other witnesses. Counsel for defendant in error, recognizing the force of this criticism, say in their brief: "In view of the fact that the court did not instruct the jury upon the degree of care the passenger is entitled to from the hands of the railroad company when he is a passenger, and the court did not define the difference between degrees of care due from a railroad company or common carrier to a regular passenger, and when he is not a regular passenger, nor yet a trespasser, and who is permitted to ride upon the train without paying fare, we can see no reason for contending or supposing that plaintiff in error was prejudiced by the instructions complained of. The court simply used in every instance in its instructions the word 'negligence' without qualifying it by the words 'slight,' 'ordinary,' or 'gross,' and ¹¹⁹ where that is done this court has held that ordinary negligence is meant."

We think this argument sound, if supported by the facts; but unfortunately the instructions also contain this language: "A railroad carrying passengers is bound to use more than ordinary care in avoiding accident and injury to such passengers, and it would be liable for slight negligence when it causes or directly and materially contributes to such injury without the fault of the person injured."

This is a statement of the measure of care due to regular passengers. There is nothing in the instructions to qualify these declarations as to the law, and, in order to affirm this judgment, we must hold that the same measure of extreme care which a railroad company is bound to exercise in favor of passengers transported for hire is due to one who rides on its train by the consent of a conductor without the payment of any compensation to the company for its services. To so hold would be not only to overrule the case of *St. Joseph etc. R. R. Co. v. Wheeler*, 35 Kan. 185, above cited, but to establish a rule which does not seem to us founded in justice or supported by sound reason. The fact that the plaintiff's own evidence is perhaps ample to show a want of ordinary care does not help the matter, for, under the instructions of the court, the jury were not required to determine whether the defendant was merely lacking in ordinary prudence, but were told, in effect, that slight negligence was sufficient to warrant a recovery. Under the instructions, the jury could hardly do otherwise than return a verdict for the plaintiff,

even though they might not credit her statements as to all that transpired rather than those of other witnesses in the case. It necessarily follows that the judgment must be reversed, and a new trial ordered.

All the justices concurring.

FINDING OF JURY WILL NOT BE DISTURBED if there is any evidence to support it: *Reiley v. Haynes*, 38 Kan. 259; 5 Am. St. Rep. 737, and note. The appellate court will never weigh evidence for the mere purpose of determining the preponderance. Controverted questions of fact will not be reconsidered on appeal: See note to *Bohannon v. Combs*, 10 Am. St. Rep. 330.

PAYMENT OF FARE AS AFFECTING LIABILITY OF PASSENGER CARRIER: See *Ohio etc. R. R. Co. v. Muhling*, 30 Ill. 9; 81 Am. Dec. 336, and note.

KITCHEN v. BELLEFONTAINE NATIONAL BANK.

[53 KANSAS, 262.]

JURISDICTION—JUDGMENT BY CONFESSION—WARRANT OF ATTORNEY—NEGOTIABLE INSTRUMENTS.—A judgment on a promissory note, entered in one state by confession under a warrant of attorney, is valid in a sister state, although the defendant may, at the time of the rendition of the judgment, have been absent from the state where the contract was executed, and a resident of another state.

ACTION by the bank against Kitchen on a foreign judgment. Plaintiff recovered, and defendant appealed.

A. J. Hoskinson, for the plaintiff in error.

H. R. Boyd and William Lawrence, for the defendant in error.

242 ALLEN, J. This action was brought by the bank against the plaintiff in error on a judgment of the court of common pleas of Green county, Ohio. The defendant in the court below says that he was a resident of Kansas during all the time proceedings were pending in the Ohio court, and that that court had no jurisdiction to render a judgment against **243** him. Complaint is made of the ruling of the court in granting continuances on the application of the plaintiff. This is a matter largely within the discretion of the trial court, and in this case that discretion does not seem to have been abused. The suit in Ohio was on a promissory note, with a warrant of attorney attached, which reads as follows:

“\$1,818.43. BELLEFONTAINE, O., January 15, 1883.

“Two hundred and sixty days after date, we, or either of us, promise to pay the Bellefontaine National Bank, or order,

eighteen hundred eighteen $\frac{42}{100}$ dollars, for value received, with interest at 8 per centum per annum after maturity. And we authorize and empower any attorney at law, at any time after the above note becomes due, to appear for us, or any of us, in any court of record, and waive the issuing and service of process, and confess judgment against us jointly or severally, or against any of us, for the amount of said note, interest, and costs, in favor of the legal holder of said note, and to release all errors and waive all right of appeal, and all right to file any petition in error.

"Witness our hands and seals, this 15th day of January, A. D. 1883.

J. C. KITCHEN. [SEAL]

"R. S. KERR. [SEAL]"

The original note was admitted in evidence on the trial, over the objection of the defendant. He admitted on the witness-stand that his signature was genuine. No error was committed in its admission, as it furnished proof of the authority of the attorney who entered an appearance for the defendants.

The validity of judgments in sister states entered on general warrants of attorney, similar to the one in this case, has already been passed on by this court. This judgment was entered in term time, on the appearance of the defendant by Joseph N. Dean, who is shown by the journal entry of judgment in the Ohio court to be one of the attorneys of record of that court, under the warrant of attorney. We think the case of *Ritter v. Hoffman*, 35 Kan. 215, is decisive of the only substantial question in the case. The second clause of the *syllabus* in that case is as follows: "Under the evidence in the case, an instrument in writing confessing judgment, executed ²⁴⁴ in Pennsylvania and by a resident of that state, gives to the courts of Pennsylvania such jurisdiction over the person of the defendant that a valid personal judgment, enforceable in another state, may be rendered against him merely upon his written confession and the request of the holder of the instrument; and this without summons or pleadings, or appearance by the defendant, and by the clerk of the court, or prothonotary in vacation, and although the defendant may at the time of the rendition of the judgment be absent from the state of Pennsylvania and a resident of another state": See, also, *Dodge v. Coffin*, 15 Kan. 277; *Ward v. Baker*, 16 Kan. 31. We think the warrant of attorney is to be construed as authorizing an appearance in the courts

of Ohio, the place where it was executed. The validity of such powers of attorney seems to be well settled in the courts of Ohio: *Watson v. Paine*, 25 Ohio St. 340; *First Nat. Bank v. Reed*, 31 Ohio St. 435; *Clements v. Hull*, 35 Ohio St. 141.

Complaint is also made of the admission in evidence of the certificate of the comptroller of the currency of the incorporation of the plaintiff's bank under the national banking law. There was no error in this. The certificate was competent evidence, and the defendant was estopped from denying the plaintiff's corporate existence: *Massey v. Citizens' Building etc. Assn.*, 22 Kan. 624.

Other errors are assigned, but we deem them unworthy of special mention. No claim is made that the defendant does not justly owe the debt.

The judgment is affirmed.

All the justices concurring.

CONFESSION OF JUDGMENT UNDER WARRANT OF ATTORNEY, WHEN VOID AND WHEN VALID: See *Spence v. Emerine*, 46 Ohio St. 433; 15 Am. St. Rep. 634; *Weigley v. Matson*, 125 Ill. 64; 8 Am. St. Rep. 335; note to *Lee v. Figg*, 99 Am. Dec. 278.

STATE v. STICKNEY.

[53 KANSAS, 303.]

TRIAL.—MOTION FOR CONTINUANCE.—DENIAL OF, NOT ERROR, WHEN.—The denial of a motion for a continuance in a criminal case is not error, though the defendant was arrested and had a preliminary examination eight days before the trial, and was not assigned counsel until two days before the trial, where no showing is made that the defendant is deprived of the testimony of absent and material witnesses.

TRIAL.—MOTION FOR CONTINUANCE.—DENIAL OF NOT ERROR, WHEN.—It is not error to deny a motion for a continuance in a criminal case where counsel has been assigned to defendant only two days before trial, and he, on the day preceding trial, files an affidavit for a continuance, stating that he has not had sufficient time in which to prepare for trial, and setting forth the testimony of an absent witness, whose testimony he desires, where the state consents that such affidavit may be read as the deposition of the absent witness.

NEW TRIAL.—EVIDENCE NOT JUSTIFYING.—Newly discovered testimony to discredit a witness, or which is merely cumulative, is not sufficient to warrant the granting of a new trial.

BURGLARY.—DECOY.—DEFENSE.—One who breaks into a building with the intention of committing larceny, and does every act essential to a burglarious breaking, cannot escape responsibility from the fact that there was a detective with, and apparently assisting, him in the commission of the crime.

BURGLARY—BREAKING NOT BURGLARIOUS, WHEN.—A breaking cannot be regarded as burglarious where the entrance to the building is made by the procurement and with the consent of the owner, or by a person acting in his employment; but the fact that the owner participates in decoying the criminal and effecting his arrest is of itself no consent to the commission of the crime.

John Stowell, for the appellant.

John T. Little, attorney general, and *Frank Wells*, county attorney, for the state.

308 JOHNSTON, J. Morgan A. Stickney was convicted of burglary, and the punishment adjudged was imprisonment in the state penitentiary for a term of five years. He appeals to 309 this court, and the errors relied on for reversal are: The refusal of a continuance, the insufficiency of the evidence, and the denial of a motion for a new trial upon the ground of newly discovered evidence. On December 13, 1893, in the night-time, the store-building of Daniel Birchfield, at Centralia, was broken open while the sheriff, Birchfield, and several other parties were within. After the door was broken, Stickney entered, with a navy revolver, and carrying upon his arm two grain-sacks, when he was arrested by an officer who was inside. It appears that some time previous to the occurrence the sheriff employed Oscar Payne to detect the commission of crime in the vicinity of Centralia, and, on the evening before the entry, Payne informed the sheriff that a raid upon the store was contemplated on that night, with a view of stealing merchandise therefrom. Birchfield was informed by the sheriff, and a party was organized to capture the thief. When Stickney was arrested he declared, in answer to an inquiry by the sheriff, that he was unaccompanied by any one. His defense at the trial was, that he was induced to enter the store by Payne, who broke the fastenings and effected the entrance, leaving the door open for him to pass within, and that, as Payne was in the employment of Birchfield, the breaking and entrance were not unlawful. Before the commencement of the trial he asked for a continuance on the ground that he had not had sufficient time since his arrest to "obtain the necessary evidence with which to rebut the charge alleged against him," and specifically stated that he desired the testimony of Payne, whose testimony was set forth, and which would tend to sustain his defense, as heretofore stated. He was taken into custody early on the morning of December 13th, and his preliminary

examination was held upon the same day. On December 19th counsel was assigned to him, and on the following day the affidavit for continuance was presented. The state consented that the affidavit for continuance should be read as the deposition of the absent witness, and the court denied the continuance, and ordered the case to trial on December 21st. It thus appears ³¹⁰ that the trial of Stickney did not occur until eight days after his arrest and preliminary examination. It is true that he procured counsel only two days before the trial, but there was then time to ascertain from the appellant the names of needed witnesses and the testimony he expected to obtain from them. The only witness named in the affidavit, and whose testimony he hoped to procure, was Payne, and as the state consented to treat the affidavit as the deposition of the absent witness, it cannot be held that error was committed in denying the continuance: *State v. Lund*, 49 Kan. 580.

There can be little doubt of the sufficiency of the testimony to sustain the verdict. If Payne was employed by the owner to open the door and decoy the appellant within the building, and the entrance was with the consent of Birchfield, then certainly the appellant cannot be held responsible for a burglarious entry. Birchfield positively denies that Payne was in his employment, or that the breaking of the door was at his request or by his procurement. It is shown that the door through which the entry was made was locked upon the outside, and that a wooden bar used for securing the door on the inside was left unfastened on that night. The proof showed that a person was heard to approach the door, and that, after prying upon the lock and fastenings for a space of about ten minutes, the door was broken open, and immediately afterward the appellant entered, armed with a gun about a foot long, and with two sacks upon his arm, which were presumably intended for use in carrying away merchandise. Although the appellant states that the door was broken open by Payne while appellant stood ten feet away, and that, after breaking the fastenings, Payne withdrew and induced appellant to open the door and enter the building, the witnesses who were within state positively that the entry was made as soon as the fastenings were broken. The testimony of the witnesses for the state tends to show that the breaking was done by the one who entered the building; and as Stickney was the only one who ³¹¹ entered, there is little

chance for mistake as to the breaking. Immediately upon his arrest, Stickney declared that he was unaccompanied by any one.

The question of whether there was an implied consent on the part of Birchfield to the defendant's entry was properly submitted to the jury, and we think there was sufficient testimony to justify the verdict that there was no consent to the commission of the crime. The fact that Birchfield was willing to assist in and facilitate the detection and arrest of a criminal does not amount to a consent to the commission of the crime, nor will the mere fact that there was a detective with and apparently assisting appellant in the commission of the crime constitute a defense: *State v. Jansen*, 22 Kan. 498. There was testimony tending to show that the appellant personally performed every act which was essential to the burglarious breaking. If the outside lock was broken by appellant, and an entry effected by him with the intent to commit crime, he cannot escape responsibility by the mere fact that the inside bar was not fastened, nor because the owner of the building was lying in wait to discover and apprehend the criminal. The evidence in the case was conflicting, but amply sufficient, we think, to uphold the verdict. No objection is made to the charge of the court, and an examination of it shows that it fairly presented the law of the case.

The newly discovered testimony relied on for a new trial tended to contradict some of the witnesses for the state, and such as was entitled to consideration was merely of a cumulative character. Newly discovered testimony to discredit a witness, or which is merely cumulative, is not sufficient to warrant the granting of a new trial: *State v. Kearley*, 26 Kan. 77, 89; *State v. Rohrer*, 34 Kan. 427; *State v. Smith*, 35 Kan. 618.

The judgment of the district court will be affirmed.
All the justices concurring.

TRIAL—CONTINUANCE.—PRACTICE ON APPLICATION FOR: See monographic note to *Stevenson v. Sherwood*, 74 Am. Dec. 141, 151.

TRIAL—CONTINUANCE.—WHAT ADMISSION BY ADVERSE PARTY WILL DEFEAT MOTION FOR: See note to *Stevenson v. Sherwood*, 74 Am. Dec. 148.

NEW TRIAL.—NEWLY DISCOVERED EVIDENCE, merely cumulative, or tending to impeach a witness, is not ground for a new trial: *Wisconsin Cent. R. R. Co. v. Ross*, 142 Ill. 9; 34 Am. St. Rep. 49, and note.

CRIMINAL LAW.—RIGHT TO DECOY INTO CRIME: See *Connor v. People*, 18 Col. 373; 36 Am. St. Rep. 295, and note; note to *People v. Richards*, 2 Am. St. Rep. 387.

BURGLARY—CONSENT OF OWNER TO COMMISSION OF CRIME.—EFFECT OF: *Connor v. People*, 18 Col. 373; 36 Am. St. Rep. 295, and note; monographic note to *People v. Richards*, 2 Am. St. Rep. 387.

STATE v. WHITMORE

[53 KANSAS, 343.]

LIBEL—JURY AS JUDGES OF LAW AND FACT.—By express provision of the statute in Kansas, in all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact.

LIBEL—READING FROM LAW BOOKS.—In arguing a libel case counsel for the defendant has the right, in discussing the law freely, to read to the jury from authorities, subject, of course, to the supervision of the court and such restrictions as are clearly necessary and proper; and it is error for the court to deny this right.

Robinson & McBride, for the appellant.

John T. Little, attorney general, and *M. E. Smith*, county attorney, for the state.

345 **ALLEN, J.** This was a criminal prosecution for libel. The defendant was convicted and sentenced, and appeals to this court. Only the last allegation of error need be considered. Section 309 of the code, concerning crimes and punishments, reads as follows: "In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact."

In arguing the case to the jury counsel for the defendant attempted to read from and comment upon certain authorities bearing on the law applicable to cases of libel and slander. The prosecution objected, and the court sustained the objection. The contention of the state is, that the authorities sought to be read related to actions of slander, and were, therefore, foreign to the issues in this case, because the rule as to what words are libelous and what slanderous is different. One of the cases from which defendant's counsel attempted to read (*Funk v. Beverly*, 112 Ind. 190) was a civil action to recover damages both for slander and libel, and we 346 are unable to perceive any good reason why it would not be an authority that might be properly presented to a court.

Libel and slander are in substance much the same, though it is true that the rules of law applicable to a criminal prosecution for libel, and to a civil action to recover damages for slander, are not in all respects the same; yet the subjects are not so foreign to each other that a case with reference to slander can be said to be utterly foreign to the subject of a prosecution for libel. In the case of *State v. Verry*, 36 Kan. 416, it was held that the court erred in refusing to permit counsel for the defendant to address the jury upon the questions of law involved in the case, unless the argument coincided strictly with the law as stated by the court in its instructions, and that counsel for the defendant had a right to present and press upon the jury views and interpretations of the law at variance with those stated by the court. That case settles the question as to the right of counsel to discuss the law freely, subject, of course, to the supervision of the court and such restrictions as are clearly necessary and proper.

In this case we have only one further question, namely, whether, in discussing the law, counsel may read from authorities of recognized weight. The jury having been constituted a tribunal, not only for the determination of questions of fact, but of law as well, it would be a very strange rule that would deprive them of the advantage of the reasoning of courts and of law-writers to enlighten their judgment. It would be indeed strange if courts, composed of men specially trained and educated to a knowledge of the law, should at all times be entitled to be aided by the books, yet juries, having no such advantages, should be denied the light they afford. In *Thompson on Trials*, section 945, it is said: "If the right exists to argue the law of the case to the jury it must follow that the right exists to read books of the law to them as authority and for illustration, in like manner as counsel would do in arguing the law to the court. This right has accordingly been upheld in those jurisdictions where the right to argue the law to the jury exists, those courts³⁴⁷ holding that a substantial denial or deprivation of it is error for which a new trial will be granted."

In support of this proposition the following cases are cited by the author: *Commonwealth v. Austin*, 7 Gray, 51; *Jones v. State*, 65 Ga. 506; *Johnson v. State*, 59 Ga. 142; *Lynch v. State*, 9 Ind. 541; *Harvey v. State*, 40 Ind. 516; *Stout v. State*, 96 Ind. 407. In other states it is said that the matter

is largely within the discretion of trial courts. Texas cases only are cited in support of this proposition. The court may restrict the arguments, not only by prescribing a limit as to the time to be consumed, but may prevent the reading of matters wholly foreign to the issue on trial, yet it may not strictly confine counsel to authorities in line with the court's instructions. Unless some latitude is allowed, the right to argue law questions to the jury becomes a barren privilege. We think it was substantial error to deny counsel the right to read from the cases mentioned to the jury.

The judgment is reversed and a new trial ordered.

All the justices concurred.

JURY TRIAL.—THE READING OF LAW BOOKS TO THE JURY should be checked by the judge, except in those cases where the jurors are judges of the law as well as of the facts: Note to *Sullivan v. Royer*, 1 Am. St. Rep. 54.

JURY AS JUDGES OF LAW AND FACT—LIBEL.—This question, so far as it concerns cases of libel, is discussed in the note to *State v. Syphrett*, 13 Am. St. Rep. 625-627. Since that note was written the supreme court of Missouri has declined to follow the rule announced in *State v. Hoemer*, 85 Mo. 553, cited in the note mentioned, so far as it holds that the jury, in libel cases, must be guided by the directions which the court may give, and not by what they may determine the law to be. Section 14, article 2, of the constitution of Missouri provides that in prosecutions for libel, "the jury, under the direction of the court, shall determine the law and the facts." There is a like statutory provision, and which was noticed in *State v. Hoemer*, 85 Mo. 553, but that case was decided without a consideration of the constitutional clause; and the history of this clause having been brought to the attention of the court in *State v. Armstrong*, 106 Mo. 395, 27 Am. St. Rep. 361, a prosecution for criminal libel, and the court deeming it of the very greatest importance that the constitution should govern, it was decided not erroneous to charge that, "under the constitution of Missouri and the statutes thereof, the jury are themselves the judges of the law of libel, as well as of the facts, and that they are not required to accept the instruction given by the court as being conclusive of what the law of criminal libel is." Such instruction was considered to be, in substance and effect, "just what the constitution commands"; and that it was simply another way of stating that while the judge may assist the jury, and inform them what the law is, and which it is his duty to do, "still they are, by virtue of the organic law, the final judges in a prosecution for criminal libel." The instructions of the court in such cases are not to bind the consciences of the jury, but only to inform their judgments: *State v. Zimmerman*, 31 Kan. 85; *In re Lowe*, 46 Kan. 255, 258. It is not error, however, under a constitutional provision authorizing the jury in a libel case to be judges of both "the law and the facts," for the judge to charge the jury as to the law of libel. On the contrary, it is his duty to do so: *State v. Syphrett*, 27 S. C. 29; 13 Am. St. Rep. 616.

The constitution of New Jersey provides that, in prosecutions for libel, "the jury shall have the right to determine the law and the fact," and when the question was first raised it was thought that under this provision

the jury could not lawfully disregard the instruction of the judge as to the law of the case, but the matter was left as an open question: *State v. Jay*, 34 N. J. L. 368. But in *Drake v. State*, 53 N. J. L. 23, it is held that this provision "was not intended to affect the duty of the court to decide all questions of law relating to the admission of testimony, and such other matters as are preliminary to the final submission of the cause to the jury, nor to affect its duty to instruct the jury with regard to their legitimate province in the decision of the cause, and with regard to those general principles of the criminal law, and of the law of libel, which are of a technical nature, and with which the jury can scarcely become acquainted, save through the instructions of the court"; that it "does not deprive the court of the right to express its opinions to the jury touching the character of the particular publication charged as libelous, and the motives and ends presented for its justification"; that it enjoins upon the court "the duty of admitting evidence tending to show the truth of the publication, and the motives and ends of the publisher"; and that it declares and secures "the right of the jury to decide for themselves, with proper regard to the views of the court, whether the meaning and tendency of the publication were such as to bring it within the legal definition of a libel, whether it was privileged under the rules of the common law, and whether it was true and published with motives which to them appeared good, and for ends which to them appeared justifiable, in short, the right of the jury to give a general verdict in the whole matter put in issue (if we adopt the English phrase), or to determine the law and the fact (if we employ the equally broad and more explicit American substitute). Section 25, article 6, of the constitution of Michigan, making the jurors judges both "of law and fact" in "all prosecutions" for libel, has also been held not to deprive the trial judge of the power to rule on the admissibility of evidence: *Thibault v. Sessions*, Supreme Court, Michigan, June 26, 1894. In a prosecution for libel, the whole case, law and fact, is determined by a general verdict: *State v. Allen*, 1 McCord, 525; 10 Am. Dec. 687; and it was to accomplish this result that "Fox's Libel Act" was passed in England, after a discussion of the question in the courts and parliament for over half a century: *State v. Burpee*, 65 Vt. 1, 22; 36 Am. St. Rep. 775, 789.

CRIMINAL CASES, GENERALLY.—While the clause that "the jury are to determine the law and the fact" has been most frequently construed in cases of prosecutions for criminal libel, this clause has also been the subject of diversity of opinion in other criminal cases, as some of the state constitutions and statutes have an express constitutional provision by which jurors are declared to be judges of the law in all criminal cases. Thus, in a prosecution for larceny in Indiana, the jury were instructed: "You, gentlemen, in this case are the judges of the law as well as of the facts. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same, and construe it for yourselves. Notwithstanding you have the legal right to disagree with the court as to what the law is, still you should weigh the instructions given you in the case as you weigh the evidence, and disregard neither without proper reason." This instruction was held to be fully sustained by authority, and to be correct on principle. "The constitution," said the court, "gives to juries in criminal cases the right to determine the law as well as the facts. It does not, however, give to them the right to disregard the law. To aid them in correctly determining the law it is made the duty of the court to instruct them. They have no more right in determining the law to disre-

gard and ignore the court's instructions arbitrarily and without cause than to disregard and ignore the evidence, and determine the facts arbitrarily and without cause": *Blaker v. State*, 130 Ind. 203. So, under the statute of Illinois, the jury, in all criminal cases, are made the judges of the law and the fact: *Fisher v. People*, 23 Ill. 283; *Mullinix v. People*, 76 Ill. 211; and are not bound to take the law as given by the court: *Fisher v. People*, 23 Ill. 283. In *Mullinix v. People*, 76 Ill. 211, on the trial of an indictment for selling intoxicating liquor, the defendant asked the following instruction: "The court instructs the jury for the defense that the jury are the sole judges of the law as well as the facts in the case," which was given with the following modification: "But the jury are further instructed that it is the duty of the jury to accept and act upon the law, as laid down to you by the court; unless you can say, upon your oaths, that you are better judges of the law than the court, then you are at liberty to so act." This modification was held, under the statute, to be "eminently just and proper," and strictly in accordance with authority.

Under a constitutional or statutory rule that the jury, in all criminal cases, shall be the judges of the law and the fact, it is proper for counsel to be permitted to read and discuss the law in their arguments to the jury on the trial of a criminal case: *Lynch v. State*, 9 Ind. 541; *Stout v. State*, 96 Ind. 407. But the jury should be informed that such reading is a part of the argument of counsel, and not evidence: *Harvey v. State*, 40 Ind. 516; and if error is committed by counsel it should be corrected by the court in its charge: *McMath v. State*, 55 Ga. 304; *Warmock v. State*, 56 Ga. 503. Without the right of counsel to present their view of the law as well as the facts to the jury there could be no intelligent application of the law to the facts: *Warmock v. State*, 56 Ga. 503.

While the jury, under such a constitutional or statutory provision, have the right to determine both the law and the facts in all criminal cases (*Stout v. State*, 96 Ind. 407; *Keiser v. State*, 83 Ind. 234; *Fowler v. State*, 85 Ind. 538; *Powers v. State*, 87 Ind. 144; *Hill v. State*, 64 Ga. 453; *McRae v. State*, 52 Ga. 290; *Hooper v. State*, 52 Ga. 607; *Patterson v. State*, 2 Eng. 59; 44 Am. Dec. 530; *Tresca v. Maddox*, 11 La. Ann. 206; 66 Am. Dec. 198; *Mitchell v. State*, 22 Ga. 211; 68 Am. Dec. 493; *State v. Tally*, 23 La. Ann. 677), it is not strictly true that it is the sole judge of the law of the case: *Anderson v. State*, 104 Ind. 467. Such a provision "evidently means that the jury have the right to determine all questions of law applicable to such matters as they are required to consider in making up their verdict, but cannot be rightfully construed to mean that the jury are the sole judges of the law in every respect in a criminal cause. The court judges of the sufficiency of an indictment under the law. It decides all questions of law arising upon the admissibility of evidence, and has the power to grant a new trial when the jury have erroneously determined the law injuriously to the defendant. The judge, too, is required to instruct the jury upon all matters of law necessary for their information in the rendition of a verdict in a criminal cause. Thus, instructing the jury involves, in a qualified sense at least, the exercise of a judgment upon all matters of law concerning which the judge must give information to the jury. The jury are consequently not, strictly speaking, the sole judges of the law in all its relations to a criminal case": *Anderson v. State*, 104 Ind. 467.

It is the duty of the jury to apply the law to the facts of the case, and, if they have no well-defined opinions or convictions as to what the law is, in relation to any matter at issue, they must get the law from some source;

and it is their duty, their necessary duty, to find out what the law is, and to come to a conclusion upon the matter, just as it is their duty to find out what the facts are. They have to judge of both to come to a conclusion as to both. And, in the exercise of the constitutional or statutory right of the jury to judge of the law and the facts, the judge is the only channel through which they are to get the law. "They have no right to go out of the evidence for the facts, nor to go away from the judge for the law. From these two sources they are to get the material for their verdict, and they are thus judges of the law and facts, and must find a general verdict, including law and fact: *Bird v. State*, 107 Ind. 154; *Edwards v. State*, 53 Ga. 428. It being made the duty of the court to instruct the jury, it would seem to follow that the jury should, at least, give to the instructions a respectful consideration especially in cases where they are in doubt as to what the law may be: *Bird v. State*, 107 Ind. 154; *Keiser v. State*, 83 Ind. 234.

The instructions which a court may give in a criminal case cannot, under such a constitutional or statutory provision, be more than advisory in their influence upon the ultimate judgment of the jury, both as to the law and the ultimate facts involved in the trial: *Nurum v. State*, 88 Ind. 599; *Hudelson v. State*, 94 Ind. 426; 48 Am. Rep. 171; *Lynch v. State*, 9 Ind. 541; and it is not error to instruct the jury that the instructions of the court are advisory only, and may be disregarded: *Hudelson v. State*, 94 Ind. 426; 48 Am. Rep. 171; *Powers v. State*, 87 Ind. 144; *Hooper v. State*, 52 Ga. 607. "Even the decisions of the supreme court," says Worden, C. J., in *Keiser v. State*, 83 Ind. 234, "are no more binding upon juries in such cases than the charge of the judge trying the cause. Both may well aid the jury in determining the law applicable to the case, but neither source of information is legally binding upon them, if they choose to determine the law for themselves": *Powers v. State*, 87 Ind. 144. And it is proper to so instruct the jury: *Fowler v. State*, 85 Ind. 538.

While jurors have the right, under such a constitutional or statutory provision, to make an application of the law to the facts, according to their own convictions of the truth of the case (*Hooper v. State*, 52 Ga. 607; *McRae v. State*, 52 Ga. 290), it must not be understood that this provision places the jury above the law, or "that it confers upon them the lawful right to decide simply as they 'see fit,' regardless of all law, as it has been recognized or established by the proper tribunals." For example, an instruction that, "even if all the facts alleged in the indictment are established beyond a reasonable doubt, you have still the right to determine whether or not such facts, when so established, constitute a public offense under the laws of the state, and if you determine that they do not, you have the right to acquit the defendant," is properly refused as implying an unnecessarily extreme construction of the constitutional right of a jury in a criminal case: *Anderson v. State*, 104 Ind. 467.

The charge of Judge Baldwin, in *United States v. Wilson*, Bald. 78, 99, is a good model in this class of cases as to the point under consideration, in which he says: "We have thus stated to you the law of this case under the solemn duties and obligations imposed on us, under the clear conviction that in doing so we have presented to you the true test by which you will apply the evidence to the case; but you will distinctly understand that you are the judges both of the law and fact in a criminal case, and are not bound by the opinion of the court; you may judge for yourselves, and, if you should feel it your duty to differ from us, you must render your verdict accordingly. At the same time it is our duty to say, that it is in perfect accordance with

the spirit of our legal institutions that courts should decide questions of law, and the juries of facts; the nature of the tribunals naturally leads to this division of duties, and it is better, for the sake of public justice, that it should be so; when the law is settled by a court there is more certainty than when done by a jury; it will be better known and more respected in public opinion. But if you are prepared to say that the law is different from what you have heard from us you are in the exercise of a constitutional right to do so. We have only one other remark to make on this subject: by taking the law as given by the court you incur no moral responsibility; in making a rule of your own there may be some danger of a mistake." In a later case the above instruction has been approved, and it has been held that, under the Pennsylvania bill of rights, the jury in a criminal case have the power, and consequently the right, to render a verdict contrary to the instructions of the court upon the law; and that section 24, article 3, of the new constitution of 1873, authorizing a writ of error in criminal cases, does not change the rule that in such cases the jury are judges of the law as well as of the facts: *Kane v. Commonwealth*, 89 Pa. St. 522; 33 Am. Rep. 787. The authority of this case, however, is shaken by what Mr. Justice Mitchell says in his concurring opinion in *Commonwealth v. McManus*, 143 Pa. St. 64. There the prisoner asked an instruction that "the jury are judges of the law as well as the fact." The answer given was: "The statement of the law by the court is the best evidence of the law within your reach; and therefore, in view of that evidence, and viewing it as evidence only, you are to be guided by what the court has said with reference to the law." On appeal this was considered to be an "accurate and carefully considered answer" to the point, and to be "entirely in harmony" with *Kane v. Commonwealth*, 89 Pa. St. 522, 33 Am. Rep. 787, as it left the jury "to decide the whole case upon the law and the evidence—not upon the law as distinct from the evidence." It was also considered that the jury were instructed as to what was the best evidence of the law; "that is to say, in the language of the constitution, they were to determine 'the law and the facts, as in other cases,' under the advice and direction of the court." But Mitchell, J., while concurring in the judgment, took the ground that the question should "have been answered with an unqualified negative"; that the jury are not judges of the law in any case, civil or criminal; and that neither at common law nor under the constitution of Pennsylvania is the determination of the law any part of their duty or their right. The consistency of this position, with his concurrence in the judgment of the court, is not apparent, notwithstanding his extended discussion of the "unsound doctrine" and "notion of modern growth."

Under a constitution or statute which makes the jury judges "both of the law and the evidence," it is a necessary consequence that they should be sworn to decide according to both: *Patterson v. State*, 2 Eng. 59; 44 Am. Dec. 530.

There is no remedy where the jury acquit contrary to law; but there is a check upon their conduct if they convict contrary to law, for in such a case the courts have ample power to correct the wrong by setting aside the verdict: *Keiser v. State*, 83 Ind. 234. Viewed from another standpoint, the jury, in case of a conviction, seem to be the original judges of the law, from whose conclusion the defendant may appeal to the court as the final judge of the law.

In the absence of any constitutional or statutory provision authorizing the jury to be judges of the law and fact the clear weight of authority is

that, in criminal cases, the jury are not judges of the law as well as of the facts, as will be seen by examining the well-considered case of *State v. Burpee*, 65 Vt. 1, 36 Am. St. Rep. 775, and the authorities therein cited. This case overrules *State v. Croteau*, 23 Vt. 14; 54 Am. Dec. 90, and the subsequent cases in Vermont on this point.

STATE v. DODGE CITY, MONTEZUMA, AND TRINIDAD RAILWAY COMPANY.

[58 KANSAS, 377.]

RAILROADS—PUBLIC USE.—Railroads, like all other public thoroughfares, are public instrumentalities; and the power to construct and maintain them is granted to corporations for a public purpose.

RAILROADS—RIGHT TO REMOVE.—When once constructed under a lawful charter, a railroad, including the roadbed, superstructure, and other permanent property of the corporation, is charged not only in the hands of the original corporation, but of purchasers as well, with the burden of the company's charter obligations, and cannot be removed or relieved of such burden without the consent of the state.

Milton Brown and J. B. Naylor, for the plaintiff in error.

378 ALLEN, J. This action was instituted by the county attorney of Gray county, in the name of the state, to restrain the defendant from tearing up and removing the track, ties, and iron from that part of the roadbed of the Dodge City, Montezuma & Trinidad railroad in Gray county. A restraining order was granted by the district judge, to continue in force until December 22, 1893, which time was fixed for hearing the application for a temporary injunction. A hearing was had at that time, and the temporary injunction was denied. The plaintiff brings the case here for review.

While the title to a completed railroad is vested in the corporation it is only private property in a qualified sense. Railroads, like all other public thoroughfares, are public instrumentalities. The power to construct and maintain railroads is granted to corporations for a public purpose. The right to exercise the very high attributes of sovereignty, the power of eminent domain and of taxation, to further the construction of railways, could not be granted to aid a purely private enterprise. The railway corporation takes its franchises subject to the burden of a duty to the public to carry out the purposes of the charter. The road, when constructed, becomes a public instrumentality, and the roadbed, superstruc-

ture, and other permanent property of the corporation are devoted to the public use. From this use neither the corporation itself, nor any person, company, or corporation deriving its title by purchase, either at voluntary or judicial sale, can divert it without the assent of the state. It matters ^{not} whether the enterprise as an investment be profitable or unprofitable the property may not be destroyed without the sanction of that authority which brought it into existence. Without legislative sanction railroads could not be constructed. When once constructed they may only be destroyed with the sanction of the state. The legislature unquestionably has the power to authorize the abandonment of railroads when they cease to be of public utility. It may be, also, that in an action prosecuted by the attorney general, on behalf of the state, to forfeit the charter and wind up the affairs of a railroad corporation, for any proper cause, the court might make all necessary orders for the disposition of the property of the company; but in this case the state appeared, by the county attorney of the county in which the road was located, protesting against the removal of the superstructure of the road. The court erred in refusing the injunction asked.

The general propositions stated above are abundantly supported by authority: *Erie etc. R. R. Co. v. Casey*, 26 Pa. St. 287; *State v. Sioux City etc. Ry. Co.*, 7 Neb. 357; *People v. Louisville etc. R. R. Co.*, 120 Ill. 48; *Railroad Commrs. v. Portland etc. R. R. Co.*, 63 Me. 269; 18 Am. Rep. 208; *Peoria etc. Ry. Co. v. Coal Valley Min. Co.*, 68 Ill. 489; *Gates v. Boston etc. R. R. Co.*, 53 Conn. 333; *Thomas v. Railroad Co.*, 101 U. S. 71; *York etc. R. R. Co. v. Winans*, 17 How. 30; *Pierce v. Emery*, 32 N. H. 484; *People v. New York Cent. etc. R. R. Co.*, 28 Hun, 543.

These views are also in accordance with prior decisions of this court: *Commrs. of Leavenworth Co. v. Miller*, 7 Kan. 479; 12 Am. Rep. 425; *St. Joseph etc. R. R. Co. v. Ryan*, 11 Kan. 603; 15 Am. Rep. 357; *State v. Lawrence Bridge Co.*, 22 Kan. 438; *City of Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609; 37 Am. St. Rep. 312.

We have decided this case on what appears in the record, without reference to facts developed on the hearing of other cases relating to the same railroad company, which may deprive the plaintiff of any substantial benefit from the deci-

sion in this case. The order of the district court refusing the temporary injunction is reversed.

All the justices concurred.

RAILROADS ARE NOT PRIVATE AFFAIRS, BUT A PUBLIC PURPOSE: *Sharpless v. Mayor etc. of Philadelphia*, 21 Pa. St. 147; 59 Am. Dec. 759, and note.

GAUNT v. HARKNESS.

[53 KANSAS, 405.]

EVIDENCE—HANDWRITING—FORGED SIGNATURES—EXPERTS—IMPROPER CROSS-EXAMINATION.—On an issue as to the genuineness of the defendant's signature to a promissory note it is error to allow the defendant on cross-examination to show plaintiff's expert witnesses a number of papers to which defendant's name is attached, which are not in evidence in the case and concerning the genuineness of the signatures to which no evidence has been introduced, and then ask them to give their judgment as to the genuineness of such signatures, from a comparison with those already in evidence, and admitted by both parties to be genuine; to afterwards introduce such papers in evidence, and then to prove by another witness that such witness himself wrote the signatures to such papers.

EVIDENCE—PROOF OF HANDWRITING BY COMPARISON.—On an issue as to the genuineness of a signature, writings, not a part of the case, and not shown by evidence to be genuine, should not be admitted in evidence, either on the direct or cross-examination of an expert witness, for the purpose of proving handwriting by comparison.

ACTION on a promissory note. Judgment was rendered for defendant, and plaintiff appealed.

Keeler, Welch & Wagener and E. S. Jones, for the plaintiff in error.

James D. Snoddy, for the defendant in error.

409 ALLEN, J. Thomas W. Gaunt brought this action, declaring on a promissory note for fifteen hundred dollars, which he alleged was executed by the defendant on the twenty-third day of January, 1889, due in one year, payable to J. S. Beckwith, or order, and by Beckwith duly indorsed to the plaintiff. The defendant answered, denying the execution of the note, and also denying that the plaintiff was a purchaser in good faith and for value. The case was tried with a jury, and the principal issue was as to the genuineness of the defendant's signature on the note. Many witnesses were examined as experts, and testified from a comparison

of handwritings as to the signature on the note. On cross-examination of the witnesses for the plaintiff they were shown a number of papers to which the name of the defendant was attached, which were not in evidence in the case, and concerning the genuineness of the signature to which no evidence had been introduced, and they were asked to give their judgment as to the genuineness of such signatures from a comparison with those already in evidence, and admitted by both parties to be genuine. Over the objection of the plaintiff the witnesses were required to answer the questions. Afterward the defendant placed L. R. Sellers on the stand as a witness, and proved by him that certain of the signatures so used on cross-examination were written by himself. The plaintiff's experts had been deceived by these counterfeits, and some of them had expressed the opinion that they were genuine.

The principal claim of error in the case is based on the mode of cross-examination allowed by the court. That the failure of plaintiff's witnesses to detect the forged signatures submitted to their inspection must have tended strongly to detract from the force of their testimony is apparent, and if it was error to permit the use of papers prepared for the express purpose of breaking down the testimony of these witnesses, the error is so material as to require a reversal of the judgment. Probably there is hardly any rule as to the introduction ⁴¹⁰ of evidence on which courts express a greater diversity of opinion than that relating to the proof of handwriting by comparison: 1 Greenleaf on Evidence, sec. 576. It has frequently been said that the value of expert testimony is but slight, yet, inasmuch as business transactions in endless number and of great importance are carried on wholly on the faith of a recognition of signatures, it cannot be said that the testimony of experts accustomed to act on their recognition of the handwriting of persons with whom they deal is without weight. It is said in some of the earlier cases that the rule in the English common-law courts, prior to the act of parliament making such evidence admissible, was, that evidence by comparison of handwriting could not be allowed as independent proof, unless in relation to ancient writings, concerning which an exception was allowed, and there are cases in this country upholding this doctrine: *Berryhill v. Kirchner*, 96 Pa. St. 489; *Strother v. Lucas*, 6 Pet. 763; *Kirksey v. Kirksey*, 41 Ala. 626; *Kinney v.*

Flynn, 2 R. I. 819. The admissibility of such testimony has been considered and sustained by this court in various cases: *Macomber v. Scott*, 10 Kan. 335; *Joseph v. First Nat. Bank*, 17 Kan. 256; *Abbott v. Coleman*, 22 Kan. 250; 31 Am. Rep. 186; *State v. Zimmerman*, 47 Kan. 242.

In England, now, and in all of the United States, the testimony of experts seems to be admitted by the courts. The divergence of opinion in the various tribunals is mainly as to the basis of comparison. In some states it is held that comparison can only be made with other papers already in evidence in the case: *People v. Parker*, 67 Mich. 222; 11 Am. St. Rep. 578; *Randolph v. Loughlin*, 48 N. Y. 456; *Hynes v. McDermott*, 82 N. Y. 41; 37 Am. Rep. 538; *Yates v. Yates*, 76 N. C. 142. In other states it is held that comparisons may be made with writings introduced in evidence solely for the purpose of comparison, but that the genuineness of such writings must be admitted by the party against whom they are used: *Dietz v. Fourth Nat. Bank*, 69 Mich. 287; *Wagoner v. Ruply*, 69 Tex. 700; *Shorb v. Kinzie*, 80 Ind. 500; *Merritt v. Straw*, 6 Ind. App. 360; while in others it is said that writings with ⁴¹¹ which comparisons may be made must be admitted or proved to be genuine. Where the latter rule prevails it is generally said that the proof must be strong and clear, and sometimes that the genuineness must be proven clearly and beyond a reasonable doubt: *Bragg v. Colwell*, 19 Ohio St. 407; *Pavey v. Pavey*, 30 Ohio St. 600; *Richardson v. Newcomb*, 21 Pick. 315; *Winch v. Norman*, 65 Iowa, 186; *Commonwealth v. Coe*, 115 Mass. 481; *Rowell v. Fuller*, 59 Vt. 688; *Hanriot v. Sherwood*, 82 Va. 1; *Sankey v. Cook*, 82 Iowa, 125.

It is urged by counsel for the defendant in error that it was proper to test the capacity of the plaintiff's expert witnesses to detect a forged signature in the manner resorted to in this case, and that for that purpose signatures designed to deceive may be used; that the failure of the witness to point out which are genuine and which forged signatures conclusively shows that he is not an expert, and therefore his testimony is not to be credited. No cases are cited by him in support of this position. The only case we are able to discover which in any manner upholds that position is that of *Thomas v. State*, 103 Ind. 419. No authorities are there cited, and there is not enough stated in the opinion to give a clear idea of the question ruled on in that case. 1 Wharton

on Evidence, section 710, seems also to support that view. On the other hand the question has been fully considered in neighboring states, and such mode of examination held inadmissible. In the case of *Ross v. First Nat. Bank*, 91 Mo. 399, 60 Am. Rep. 258, "the cashier testified that he knew the plaintiff's handwriting. He examined the disputed check and several other checks then in evidence for other purposes, and conceded to be genuine, and stated that the signatures to all of the checks were in the handwriting of the plaintiff; that they were all alike. On cross-examination counsel for plaintiff placed before the witness the name of W. P. Rose, written upon two blank checks, concealing from his view the other portions of the checks, and asked him in whose handwriting these signatures were. Witness answered that if checks signed as these were were presented to the bank he would pay them as Rose's checks. Plaintiff, in rebuttal, called another person, who ⁴¹² stated that he wrote the name of W. P. Rose on the blank checks during the progress of the trial."

After reviewing the authorities the court says: "The rule which excludes extrinsic papers and signatures is substantially the same in the direct and cross-examination as will be seen from the foregoing authorities. Papers not a part of the case and not relevant as evidence to the other issues are excluded mainly on the ground that, to admit such documents would lead to an indefinite number of collateral issues, and would operate as a surprise upon the other party, who would not know what documents were to be produced, and hence could not be prepared to meet them. The reason of the rule applies to the cross-examination with as much force as to the direct examination. The signatures should have been excluded, whether used to test the witness as an expert or to test his knowledge of the handwriting of the plaintiff. We cannot say the evidence did no harm. The error was in the reception of evidence on the only disputed fact in the case, and the judgment must be reversed, and the cause remanded."

In *Massey v. Farmers' Nat. Bank*, 104 Ill. 327, on cross-examination of a witness who had testified with reference to the genuineness of the signature, a paper having the party's name written on it sixteen times was shown to the witness, and he was asked to pick out the genuine signature. The court ruled excluding the question, and the supreme court

affirmed the ruling, and, after commenting on what is said in Wharton on Evidence, says: "Without stopping to inquire as to the general correctness of this observation, and especially where the rule obtains, as in this state, that evidence of the genuineness of handwriting based on the comparison of hands is not admissible, we think that at least in reference to test paper got up for the occasion, as in the present case, there was no error in not allowing the course of cross-examination proposed."

To the same effect is *Tyler v. Todd*, 36 Conn. 218. Whether the writing with which comparison is sought to be made must be admitted to be genuine by the party against whom it is used has never been decided by this court, nor is it necessary ⁴¹³ in this case to decide that question, for here a number of writings not shown by evidence to be genuine were introduced in evidence. L. R. Sellers testified that he wrote the signatures to exhibits 1, 2, and 3. These appear to be notes signed by Harkness, payable to the Mound City bank, marked "paid," and, so far as the form of the papers is concerned, were well calculated to deceive. Exhibits Nos. 17 to 31 were offered in evidence as genuine signatures of Mr. Harkness. He himself testified to their genuineness.

It is contended by counsel for plaintiff in error that, under the rule as declared in *Shorb v. Kinzie*, 80 Ind. 500, the declaration or admission of the defendant himself that they were genuine signatures is insufficient, but here Harkness not only admitted their genuineness, but testified that they were so. It is unnecessary, however, to decide whether exhibits 17 to 31, inclusive, were admissible on this showing as to their genuineness, Nos. 1, 2, and 3 were inadmissible under the rule declared in *Rose v. First Nat. Bank*, 91 Mo. 399, 60 Am. Rep. 258, and *Massey v. Farmers' Nat. Bank*, 104 Ill. 327, above cited, which we think correctly declared the law. Other errors are alleged, but we do not deem them worthy of extended notice. The issue was fairly raised as to whether or not the plaintiff was a *bona fide* holder for value of the note sued on, and there was some testimony tending to support the defendant's theory. We perceive no other material error in the case. For the error in admitting the fabricated signatures and allowing plaintiff's witnesses to be cross-examined with reference to them the judgment must be reversed and the case remanded for a new trial.

All the justices concurred.

EVIDENCE—COMPARISON OF HANDWRITING—CROSS-EXAMINATION.—On the issue as to the genuineness of a signature it is not competent, on cross-examination, to submit to the witness simulated signatures, and require his opinion as to their genuineness: *Rose v. First Nat. Bank*, 91 Mo. 399; 60 Am. Rep. 258, and note. Writings made by defendant during the trial, and offered by him for comparison, are inadmissible: *King v. Donahue*, 110 Mass. 155; 14 Am. Rep. 589; *Commonwealth v. Allen*, 128 Mass. 46; 35 Am. Rep. 356.

EVIDENCE—COMPARISON OF HANDS.—PAPERS WHICH ARE NOT IN EVIDENCE IN THE CASE, and the signatures to which are not admitted to be genuine, cannot be used for the purpose of making comparison between the signatures thereto attached and the signatures on a bond or other paper in a suit: *White Sewing Machine Co. v. Gordon*, 124 Ind. 495; 19 Am. St. Rep. 109, and note, showing that such evidence is inadmissible if the writings produced for comparison are not proved or admitted to be genuine. Papers not otherwise relevant, if proved to be genuine, may, in some jurisdictions, be received in evidence for the purpose of comparison: See note to *State v. Thompson*, 6 Am. St. Rep. 177. For monographic note on comparison of handwriting, see *Homer v. Wallis*, 6 Am. Dec. 171-173.

THISLER v. MILLER.

[53 KANSAS, 515.]

ACTION—MERGER OF CAUSES.—The law does not favor a multiplicity of suits, and, where all the matters in controversy between the parties may be fairly included in one action, the law requires that it should be done.

REPLEVIN—JUDGMENT FOR PART OF PROPERTY, EFFECT OF.—If a sheriff wrongfully levies upon a number of animals by virtue of an execution against another than the owner, and takes all of them from the possession of the owner at the same time and upon the same writ, a judgment in replevin in favor of the owner for a part of the animals is a bar to another action by him against the officer to recover the remainder.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—Evidence within the knowledge of a party at the time of trial, though he was absent from the trial, and failed to communicate it to his attorney, is not newly discovered, and is not ground for granting a new trial.

ACTION by Thisler against Miller, as sheriff, to recover certain cattle taken upon execution. Defendant obtained judgment, and plaintiff appealed.

Burton & Moore, for the plaintiff in error.

John H. Mahan, for the defendant in error.

518 JOHNSTON, J. This was an action by Otis L. Thisler to recover from J. J. Miller, then sheriff of Dickinson county, thirty-one head of cattle, which had been taken upon an exe-

cution as the property of M. D. Thisler, to satisfy a judgment which had been obtained against M. D. Thisler. The answer of Miller was that the action was barred, by reason of the fact that a portion of the animals which he had seized upon that execution were taken from him by Otis L. Thisler, in a replevin action brought before a justice of the peace, in which Otis L. Thisler was plaintiff and J. J. Miller was defendant. In that action Thisler duly recovered a judgment against Miller on account of the same wrong which was complained of in the present case, which judgment was then in full force and effect against the defendant. It was further alleged that, after the rendition of that judgment against the defendant, he appealed the case to the district court, but afterward, upon motion of Miller, the appeal was dismissed, and the judgment of the justice of the peace remained valid and binding against the plaintiff and the defendant respecting all matters in controversy in the case.

519 At the trial the attorney for the plaintiff made a statement to the court of the facts which had been agreed upon between him and counsel for the defendant, to the effect that the property sought to be recovered in the action was levied upon by the sheriff under an execution issued against M. D. Thisler; that under the same execution the sheriff levied upon two horses, and at the same time upon the cattle in controversy; that afterward Thisler brought an action of replevin to recover the possession of the horses so levied upon, and in that action recovered a judgment for the possession of the horses. That action of replevin was appealed from the justice's court to the district court, and afterward, on motion of defendant, the appeal was dismissed. During the pendency of the suit before the justice of the peace and for the recovery of the horses this action was instituted for the recovery of the cattle. Upon that statement the judgment of the court was asked as to whether the action could be maintained, when the court ruled that the action of Thisler was barred, and that, upon the statement, a verdict for the defendant would be directed. Thisler then offered to prove that at the time the sheriff took the cattle they belonged to him, and that he was entitled to the immediate possession of the same. The court sustained an objection to the testimony. When the plaintiff rested, and after the defendant had offered proof of the value of the cattle which had been replevied, the court directed the jury to return a

verdict in favor of the defendant for the value of the property in controversy, to wit, seven hundred and seventy-nine dollars.

Afterward a motion for a new trial was filed, based upon the following grounds: 1. Irregularities in the proceedings of the court, by which the plaintiff was prevented from having a fair trial; 2. Excessive damages; 3. Error in the assessment of the amount of recovery; 4. The verdict was not sustained by sufficient evidence; 5. The verdict is contrary to law; 6. Newly discovered evidence material for the plaintiff, which he could not with reasonable diligence have discovered and produced at the trial; 7. Errors of law occurring at the trial and excepted to by the plaintiff. Upon this motion there ⁵²⁰ was testimony that the horses were taken upon the execution upon one day and the cattle upon the following day; and the attorney for the plaintiff stated that when he made the agreement with counsel for the defendant, and made the statement in court that the horses and cattle were taken upon the same execution at the same time, he did not know that the horses and cattle were taken at different times. As the return of the execution included all of the animals, he inferred that all had been seized at the same time, and, as Thisler was not present at the trial, he did not learn the real facts until after the verdict had been rendered. Thisler, however, testified upon the motion that he was acquainted with the facts respecting the seizure of the horses and cattle, and knew that they had been taken at different times. The testimony upon the motion, however, tends to show that both horses and cattle had been levied upon by the sheriff prior to the bringing of either action, and that the sheriff held all of them in his possession at the same place when the action before the justice of the peace was begun to recover the horses. The action to recover the cattle was begun on the evening of the same day in the district court. The court overruled the motion for a new trial; and it is now insisted: 1. That there was error in holding that the matters in issue in this case were *res adjudicata* by reason of the judgment in the former case before the justice of the peace; and 2. That the court erred in denying the motion for a new trial.

The facts agreed upon and submitted in the original statement of counsel justified the court in directing a verdict in favor of the sheriff. The judgment obtained in the first

action brought before the justice of the peace was *res adjudicata*, not only as to the matters actually considered and decided, but also as to every other matter which the parties might have litigated in the case, and which they might have had decided. The plaintiff claimed to be the owner and entitled to the possession of all the animals seized by the sheriff. If all the animals were taken by the sheriff at the ⁵²¹ same time and upon the same writ, and if the plaintiff was the owner and entitled to the possession of all of them, the wrongful detention of the sheriff constituted a single wrong as against plaintiff, and only a single action was necessary. There is as much reason for dividing the wrong and bringing thirty-three actions as there is in splitting it into two, as was done by the plaintiff. The law does not favor a multiplicity of suits, and where all the matters in controversy between parties may be fairly included in one action, the law requires that it should be done. If the plaintiff was the owner and entitled to the possession of the several animals, and they were seized at one time, it gives him but one cause of action, and he cannot be allowed to split it up and bring separate suits for the different animals: *Wichita etc. R. R. Co. v. Beebe*, 39 Kan. 465; *Shepard v. Stockham*, 45 Kan. 244; *Ellis v. Crowl*, 46 Kan. 100; *Madden v. Smith*, 28 Kan. 798; *Bennett v. Hood*, 1 Allen, 47; 79 Am. Dec. 705; *McCaffrey v. Carter*, 125 Mass. 330; *O'Neal v. Brown*, 21 Ala. 482; *Kühler v. Dobberpuhl*, 60 Wis. 256; *Herriter v. Porter*, 23 Cal. 385.

The ruling of the court upon the motion for a new trial must be sustained. The only ground assigned to which the testimony produced on the motion could apply was that of newly discovered evidence. The evidence relied on was that the property was seized at different times, and therefore that two actions could be maintained; but how can it be said that this evidence was newly discovered? It appears to have been within the knowledge of the plaintiff at the time of the trial, and his failure to communicate it to his attorney, or his absence from the trial, furnishes no reason to treat the evidence as newly discovered. Neither the negligence of the plaintiff nor the misapprehension of the attorney is sufficient ground for granting a new trial: *Holderman v. Jones*, 52 Kan. 743.

It is said that the plaintiff was misled into making an admission by the conduct of the defendant and of his counsel,

but whether or not there was any evidence to sustain the claim is immaterial, as the misconduct of the defendant or his ²²² counsel was not assigned as a ground for a new trial. More than that, the testimony offered on the motion for a new trial, and upon which the ruling of the court was based, tended to show that all the animals were within the possession of the sheriff, and were being detained by him at the time the first action of replevin was brought. If that was the case the first action should have been brought for the recovery of all. The judgment of the district court will be affirmed.

All the justices concurred.

CONSOLIDATION OF ACTIONS: See monographic note to *Logan v. Mechanics' Bank*, 58 Am. Dec. 508-512.

BOYD v. MILLS.

[53 KANSAS, 594.]

CONSTITUTIONAL LAW—ELECTORS—EXCLUDING PERSONS WHO HAVE BORNE ARMS AGAINST THE GOVERNMENT.—A provision in a state constitution that "no person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government," shall be qualified to vote or hold office in the state "until such disability shall be removed by a law passed by a vote of two-thirds of all the members of both branches of the legislature," does not contravene section 10, article 1, of the constitution of the United States, and is constitutional.

ELECTIONS—"AUSTRALIAN BALLOT LAW"—LEGALITY OF BALLOT ARISING FROM COLOR OF PAPER.—The mere fact that the paper on which all the ballots used in one election district was colored, instead of white, as required by law, is not sufficient to prevent the counting of the votes, where such colored ballots were not only printed by the authorities designated by law, and by them furnished as samples to the judges of election, who used them through an honest mistake instead of white ones, but were the only ballots furnished to or used by any voter at that voting place, as this did not impair that secrecy which is one of the prominent ends sought to be attained by the "Australian Ballot Law."

QUO WARRANTO to try the right to office.

E. Sample and Chester I. Long, for the plaintiff.

Martin & McNeal and Frank Doster, for the defendant.

⁶⁰⁰ ALLEN, J. This is an original proceeding instituted in this court by O. C. Boyd, as plaintiff, to try the right to the office of sheriff of Barber county. The petition shows

that, at the election held on the seventh day of November, 1893, according to the official canvass of the votes cast, the plaintiff received five hundred and eight and the defendant five hundred and sixteen votes. The plaintiff alleges that many illegal votes were cast and counted for the defendant, and that the plaintiff received a majority of the legal votes. The questions now presented arise on a motion by the defendant to strike out two portions of the petition, which, it is claimed, are irrelevant. The first is as follows: "That the following-named persons voted at the general election held on the seventh day of November, 1893, for the defendant, O. Mills, for sheriff, in the townships set opposite their respective names, they not being qualified electors at said election, by reason of section 2, article 5, of the constitution of the state of Kansas, each and all of them having voluntarily borne arms against the government of the United States, and voluntarily aided and abetted in the attempted overthrow of said government, and their disabilities have not been removed by a law passed by two-thirds of all the members of both branches of the legislature of the state of Kansas," with a list of names and residences of persons claimed to be disqualified.

1. Counsel for the defendant challenges the validity of that clause of the state constitution which deprives persons who ~~601~~ have voluntarily borne arms against the government of the United States of the right to vote. The section in which this provision occurs is section 2 of article 5. The section originally read as follows:

"SEC. 2. No person under guardianship, *non compos mentis*, or insane, shall be qualified to vote, nor any person convicted of treason or felony, unless restored to civil rights."

In 1867 the section was amended, and now reads as follows:

"SEC. 2. No person under guardianship, *non compos mentis*, or insane; no person convicted of felony, unless restored to civil rights; no person who has been dishonorably discharged from the service of the United States, unless reinstated; no person guilty of defrauding the government of the United States, or any of the states thereof; no person guilty of giving or receiving a bribe, or offering to give or receive a bribe, and no person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government, except all persons who have been honorably

discharged from the military service of the United States since the first day of April, A. D. 1861, provided that they have served one year or more therein, shall be qualified to vote or hold office in this state until such disabilities shall be removed by a law passed by a vote of two-thirds of all the members of both branches of the legislature."

It is contended that this section of the constitution, having been passed after the close of the war, is in the nature of a bill of attainder, imposing the penalty of disfranchisement without a trial, and is *ex post facto* in its operation. The leading cases cited as supporting this contention are *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333. The question presented in those cases was not identical with the one in this. The constitution of Missouri, as revised and amended in 1865, provided a test oath, by which a person was required to swear that he had never been guilty of any manner of disloyalty to the government of the United States, and that, after the expiration of sixty days after the taking effect of the constitution, no person should be permitted to practice as an attorney or counselor at law, or be competent ⁶⁰² as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, to teach or preach, unless such person should have taken and subscribed the prescribed oath. Cummings was a Roman Catholic priest, and was prosecuted for teaching and preaching without having taken the required oath. The supreme court of the United States held the provisions of the Missouri constitution invalid. A similar question was presented under an act of Congress in the Garland case, which was decided at the same time. The question in the latter case arose under an act of Congress prohibiting any person from being admitted to the bar of the courts of the United States without taking a similar oath. The court held, in both these cases, that the requirements were invalid, and were in the nature of bills of attainder; that they operated to deprive these men of the right to earn a livelihood by pursuing the callings for which they had been educated; that the requirement of such oaths in effect required them to condemn themselves; and that the constitution of Missouri and the act of Congress in effect condemned all persons as guilty, and prohibited them from following their callings until they should establish their innocence by expurgatory oaths. The following cases also are cited: *Green v. Shumway*, 39 N. Y. 418; *Huber v. Reily*, 53

Pa. St. 112; *Dent v. West Virginia*, 129 U. S. 115; *Rison v. Farr*, 24 Ark. 161; 87 Am. Dec. 52.

It is ably and earnestly argued in this case that to deprive a person of the right to vote is a punishment; that the right to vote and hold those offices which can only be filled by persons having the qualifications of electors is a valuable right; and that any law, whether in the form of legislative enactment or constitutional provision, which is retroactive in its operation, and takes away this right, is, in its nature, a bill of attainder inflicting penalties, and that it must be declared void under the federal constitution. It is answered, however, that the right to vote and hold office is not a natural right; that suffrage is nowhere universal, but always restricted by age, sex, and other incidents; that of necessity the organic law must prescribe the qualifications of electors, and that in doing ~~so~~ so the framers are subject to absolutely no restrictions, but may confer or withhold the right at pleasure.

The question appears to the writer not free from difficulty. The privileges of citizenship are certainly esteemed as of great value. To be deprived of them is to suffer the infliction of an injury; yet to say that the people in their organic law may not determine who shall participate in the government is to deny a power universally and necessarily exercised by the framers of every constitution. For the courts to assume the function of sitting in judgment, not merely under the constitution, but upon the constitution itself, and according to their own views declare what provisions are valid and what invalid, is a most serious undertaking; yet, of course, provisions of the constitution of the state, if framed in violation of an express prohibition by the federal constitution, must be held inoperative.

In determining who shall exercise the right of suffrage may not the people exclude classes who have shown themselves unfaithful to a public trust, or who have engaged in hostilities against either the state or the federal government? Counsel argue that the offense which is made the ground of disfranchisement is an offense against the sovereignty of the United States, not against that of the state of Kansas at all, and that only that sovereignty against which the offense has been committed can punish for the crime. This question, however, is immaterial until it be determined that the provision in the constitution is in the nature of a punishment for crime. If it be so the provision would be invalid, no matter

whether the offense be against the state or the United States, for it would be *ex post facto* in its operation.

It will be observed that the original section of the constitution disqualified persons for offenses only after conviction, while the amended section disqualifies persons convicted of felony, and also those guilty of defrauding the government or any of the states thereof, or giving or receiving a bribe, as well as those who have voluntarily borne arms against the government. In view of the fact that this provision has remained in the constitution for twenty-six years, and that at nearly ⁶⁰⁴ every session of the legislature acts have been passed removing the disqualifications of voters, that the validity of the provision has remained unchallenged, and has been accepted as the organic law of the state by the people generally, the court certainly should hesitate to overturn that which has been so long established and so universally recognized. The weight of authority, if not of reason, also seems to sustain the validity of the constitutional provision: *Anderson v. Baker*, 23 Md. 531; *Shepherd v. Grimmer*, 2 Idaho, 1123; *United States v. Cruikshank*, 92 U. S. 542; *Ex parte Yarbrough*, 110 U. S. 651; *Minor v. Happersett*, 21 Wall. 162; *Stone v. Smith*, 159 Mass. 413; McCrary on Elections, sec. 3.

The only constitutional question we now have to decide is, whether the people of the state of Kansas had the right to incorporate this provision in their organic law, and this question is answered in the affirmative. A conviction for treason, under the constitution as it stood before the amendment, would carry with it the loss of citizenship. The amendment adds nothing to the punishment for the offense. We have here no requirement of test oaths to consider. The character of evidence required to establish the disqualification of a voter under this provision is not now presented, nor do we express any opinion upon the subject.

2. Defendant also moves to strike out the following portion of the petition:

"That on the third day of November, 1893, F. A. Lewis, as clerk of Barber county, Kansas, issued and gave to S. Y. Carr, judge of the election of Deerhead precinct, one hundred official ballots; that on the eighth day of November, 1893, one hundred official ballots, unused, from Deerhead precinct were returned by John Renfrew; that on the said eighth day of November, 1893, as shown by the records in the office of the county clerk of said Barber county, there were voted in

said Deerhead township twenty colored ballots; that a true and correct copy of the record of official ballots issued for the election held on the seventh day of November, 1893, for Deerhead township, as the same appears in the office of the county clerk of Barber county, Kansas, is made a part of this petition, here referred to, hereto attached, and marked 'Exhibit A'; that on the fourth day of November, 1893, the county clerk of Barber county, Kansas, took a receipt from S. Y. Carr, judge of election of Deerhead precinct, for one hundred official ballots, a true and correct copy of which is attached to this petition, made a part hereof, and here referred to and marked 'Exhibit B'; that on the eighth day of November, 1893, the county clerk of Barber county, Kansas, took a receipt from John Renfrew, of Deerhead voting precinct, for one hundred ballots, unused, and for twenty colored ballots voted, which said receipt, as it appears in the stub-book of the county clerk of Barber county, Kansas, is in the words and figures set forth in 'Exhibit C,' which said exhibit is hereto attached, here referred to, and made a part of this petition.

"The said plaintiff further says that the returns of the election on file in the office of the county clerk of Barber county, Kansas, on the tenth day of November, 1893, show that no official ballots had been voted in Deerhead precinct, and that ballots other than white had been voted in said Deerhead precinct, and that ballots having distinguishing colors and marks thereon had been voted in said Deerhead precinct; that no legal or official ballots were cast in Deerhead precinct for any candidate for the office of sheriff or other office, at the general election held on said seventh day of November, 1893; that the five votes cast for O. C. Boyd, and the fourteen votes cast for O. Mills, shown by the returns to have been cast in Deerhead precinct, were illegal and void, and should not be counted, for the reasons above set forth."

Section 14, chapter 78, of the Laws of 1893, known as the Australian Ballot Law, contains the provision that "the ballots shall be on plain white paper, through which the printing or writing cannot be read." Section 15 provides that "ballots shall be printed and in the possession of the officers charged with their distribution at least five days before the election, accompanied by exact copies of said ballots printed on paper of any color other than white, for the inspection of candidates and their agents." It appears from the petition that in Deerhead township the election officers used the sample ballots

printed on colored paper, and returned all the official ballots, which were printed on white paper. It is conceded that all ~~606~~ of the ballots used in Deerhead township were of the same color, and the sole question with reference to their legality arises from the color of the paper. It is contended on behalf of the plaintiff that the statute is mandatory, and that no ballot can be counted unless it conforms strictly to the requirements of the law; that the court is not at liberty, by construction, to do away with any of its requirements. In this contention we think counsel for the plaintiff is in the main correct, and that the wholesome provisions of the law are neither to be disregarded nor construed away. Section 25 contains the following provision: "If a voter marks more names than there are persons to be elected to an office, or fails to mark the ballot as required by other sections of this act, or if, for any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office. No ballot without the official indorsement shall be allowed to be deposited in the ballot-box, and none but ballots provided in accordance with the provision of this act shall be counted."

That the ballots in fact used were printed and furnished by the county clerk, and were in all respects the same as the official ballot, excepting the color of the paper, is conceded, and it is also conceded that the ballots used in the one township were uniform in color. Does this fact operate to render the election at that voting precinct a nullity? In considering the statute we are to keep steadily in mind the evident purpose of the legislature in its enactment. It is plain that among the most prominent ends sought to be attained was that of absolute secrecy. Any mark or distinguishing feature on the ballots which would enable a person other than the voter himself to identify the ballot, and find out how the elector had voted, was intended to be strictly prohibited.

The case of *People v. Board of Canvassers*, 129 N. Y. 395, is relied on. The statute of New York differs materially from our own. The law requires that "on the back of each ballot shall be printed, in type known as great primer Roman condensed capitals, the indorsement, 'official ~~607~~ ballot for,' and after the word 'for' shall follow the designation of the polling place for which the ballot is prepared, the date of the election and a *fac simile* of the signature of the county clerk; the ballot shall contain no caption or other indorsement ex-

cept as in this section provided." In distributing the ballots, those printed for the Republican party were transposed so that the votes indorsed with the number of the first district in certain towns were sent to the second, and those with the second to the first, and such transpositions occurred in four towns and in nine election precincts. The twenty-ninth section of the New York act provided: "No inspector of election shall deposit in the ballot-box on election day any ballot which is not properly indorsed and numbered, except in the cases provided for in section 21 of this act, nor shall any inspector of election deposit in the ballot-box, or permit any other person to deposit therein, on election day any ballot that is torn, or that has any other distinguishing mark on the outside thereof."

It seems that separate tickets are printed there for each political party, instead of printing all the names on one ballot. In deciding the case the court lays much stress on the fact that the Republican ballots, being indorsed with the wrong number, had distinguishing marks by which they could be identified, and that the secrecy of the ballot was thereby destroyed, and also on the positive requirements of the law, that no ballot should be deposited unless properly indorsed and numbered. In the case of *State v. McKinnon*, 8 Or. 493, a ballot was rejected, written on colored paper, the law requiring it to be on plain white paper. We should have no hesitancy in saying that a single ballot printed on colored paper, where the official ballots printed on white paper were being used by other electors, could not be counted. In that case it would be plain that the object of the law was contravened.

We have examined the numerous cases cited by counsel for the plaintiff, and from them deduce two rules, which seem to be steadily adhered to by the courts: 1. That, under laws similar to our own, designed to preserve the secrecy of the ballot, any ⁶⁰⁸ mark or distinguishing feature apparent on the ballot renders it void; 2. Where the law is explicit in prohibiting the counting of any ballot which does not conform to the requirements of the statute, that the courts will enforce the law as it reads, without interposing their own judgment as to the reasonableness or unreasonableness of the requirements.

It will be observed that the law nowhere explicitly provides that a ballot printed on paper of a color other than

white shall not be counted. The only clause which could be held to imply such a provision is, that "none but ballots provided in accordance with the provisions of this act shall be counted." Among the requirements of the act, which are very minute, is one that the official ballots shall be put up in separate lots, packages of fifty ballots each, with certain marks on the outside. Will it be contended that an error in counting the ballots within any package, or in marking or addressing the package intended for any person, would vitiate the election? The departure from the law in matters which the legislature has not declared of vital importance must be substantial in order to vitiate the ballots. This appears to be the general current of all the authorities. In *Bowers v. Smith*, 111 Mo. 61, 33 Am. St. Rep. 491, it is said: "If the law itself declares a specified irregularity to be fatal the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declarations, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence as to prevent a full and free expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise, it is considered immaterial."

- In *State v. Russell*, 34 Neb. 116, 33 Am. St. Rep. 625, it was held: "The provisions in section 20 of the code, approved March 4, 1891, known as the Australian Ballot Law, for the marking of ballots with ink, is directory only, for ballots in other respects regular will, in the absence of fraud, be counted, although marked with a pencil." Under the Indiana election law of 1889 the poll clerks were required to write their ~~609~~ initials in ink in the lower left-hand corner on the back of each ballot. In one precinct, clerks, by an honest mistake, put the indorsement on the lower right-hand corner on all the ballots, and it was held, in the case of *Parvin v. Winberg*, 130 Ind. 561, 30 Am. St. Rep. 254, that the ballots were properly counted. We have not overlooked the case of *Talcott v. Philbrick*, 59 Conn. 472, cited by plaintiff's counsel, with the reasoning in which we are not satisfied. A distinction also was made by the supreme court of Michigan in the case of *Lindstrom v. Board of Canvassers*, 94 Mich. 467, between those errors or mistakes of officials which would have the effect to disfranchise a class of voters and a disregard of the provisions of the law by the electors themselves.

Without proceeding to review at greater length the authorities cited by counsel on both sides of the question, we conclude that the mere fact that the paper on which all the ballots used in one election district was of a color other than white, where the ballots were not only printed by the authorities designated by law, and by them furnished to the judges of election, but were furnished by the judges to the voters, and were the only ballots furnished to or used by any voter at that voting place, is not sufficient to prevent the counting of the votes. The secrecy of the ballot has been in no wise impaired; the voters themselves have manifested no disposition to disregard the law, and it may be fairly inferred that the use of the colored ballots was an honest mistake on the part of the judges of the election. Had a part of the ballots been white and a part colored, so as to afford some grounds for identification of the votes cast by the individual electors, a different question would be presented. We reach the conclusion that the law has not been substantially infringed, because we are unable to see how the purposes of the act can have been impaired in any degree by the mistake made in using the colored ballots. By this decision we do not intend to say that any of the provisions of the law may be disregarded, or that any ⁶¹⁰ officer may escape liability to punishment for violating any of its provisions.

The first part of the motion will be overruled, and the last part will be sustained.

All the justices concurred.

VALIDITY OF STATUTE DEPRIVING ONE WHO HAS BORNE ARMS AGAINST THE GOVERNMENT OF THE RIGHT TO VOTE: See *Rison v. Furr*, 24 Ark. 161; 87 Am. Dec. 52, and note 64. A state constitution may require an oath of loyalty to be taken as a condition precedent to the right to vote: *Blair v. Ridgely*, 41 Mo. 63; 97 Am. Dec. 248, and monographic note thereto, showing the power of the state to impose qualifications for voters and officeholders.

BALLOTS—VALIDITY OF AS AFFECTED BY COLOR OF PAPER.—If tinted paper be selected by the secretary of state and furnished for ballot paper, ballots printed upon it are lawful, and must be counted: See note to *Allen v. Glynn*, 31 Am. St. Rep. 319.

MARKS OF IDENTIFICATION ON BALLOTS.—WHAT ARE PROHIBITED: See *State v. Saxon*, 30 Fla. 668; 32 Am. St. Rep. 46, and note.

FIRST NAT. BANK OF COBLESKILL v. HELLYER

[53 KANSAS, 695.]

PAYMENT—BURDEN OF PROOF.—In an action to recover mortgaged personalty, where issue is joined on the question as to whether the debt secured by the mortgage has been paid, the burden of proof is upon the defendant.

G. A. Spaulding, for the plaintiff in error.

N. B. McCormick and Frank McKay, for the defendants in error.

695 **JOHNSTON, J.** This was an action to recover personal property which had been mortgaged by the defendants to secure the payment of a promissory note executed by them for the sum of twelve hundred and forty-five dollars and seventy-five cents. The plaintiff (which was the owner of the note) claimed that there was a balance due thereon of about three hundred and fifty dollars, and claimed a special ownership and right of possession by virtue of the chattel mortgage given to secure the payment of the debt. While the answer was a general denial, the only real controversy between the parties was with reference to the payment of the debt. The record shows that there was no contention to the ownership of the note, or that the property had been mortgaged to secure the payment of the debt. Neither was there any controversy as to the value of the property, or that demand for the same had been made.

The evidence in the case was directed to the question of payment, and, taking the testimony of the defendants with regard to the credits indorsed and the payments made, there is great doubt whether the whole of the debt in question was 696 actually paid. While the amount of all the payments made would more than equal the amount of this debt, yet Hellyer admits that a portion of the money so paid was to be applied to other indebtedness, and it is difficult to find from the evidence that a sufficient amount was paid upon the debt in question to discharge the same. The jury, however, found that the debt had been fully paid, and gave a verdict in favor of the defendants. In the trial of the case the court called their attention to the issue of indebtedness, and then, in effect, placed the burden of proof upon the plaintiff. As the defendants set up the claim of payment, the burden rested upon them to prove such payment, and

from the character of the testimony we are unable to say that this erroneous ruling was not prejudicial: *Guttermann v. Schroeder*, 40 Kan. 507.

The judgment of the district court will be reversed, and the cause remanded for another trial.

All the justices concurred.

PLEA OF PAYMENT IS AN AFFIRMATIVE DEFENSE, and must be supported by a preponderance of the evidence: *Perot v. Cooper*, 17 Col. 80; 31 Am. St. Rep. 258.

MOLINE PLOW COMPANY v. RODGERS.

[58 KANSAS, 743.]

SALE—OPTION TO RETAKE GOODS—ATTACHMENT LIEN.—If one sells goods, and delivers them, at prices and on terms of payment definitely fixed by the contract, but retains an election to retake all goods unsold by his vendee as his own, such vendor is not the owner of the goods until he exercises his right of election, and creditors who attach prior to such election acquire a valid lien.

ELECTION OF REMEDY—CONCLUSIVENESS OF.—An election of a remedy once fairly made by a party having the right to make it is final and irrevocable.

ELECTION OF REMEDY—CONCLUSIVENESS OF—SALE.—If the owner of goods delivers them to an agent under a contract authorizing the latter to sell, and retain all the proceeds over a fixed amount, and giving the owner, at a specified time, the right to require of the agent payment of the price fixed for all goods delivered, and such agent absconds, and creditors attach the goods in his possession, the commencement of an action against the agent for the purchase price, by the owner who has a knowledge of these facts, passes the title to the agent. The owner thereby treats the transactions as a sale, and will thereafter be estopped from maintaining an action to recover the property from the sheriff holding it under the writs of attachment.

REPLEVIN by the Moline Plow Company to recover from the sheriff and undersheriff of Ness county certain agricultural implements, which had been attached under process issued against one L. H. Underwood. The property was obtained from the plaintiff, by Underwood, under two written contracts, one of them for Knowlton mowers alone, and the other for implements, consisting of plows, cultivators, harrows, corn-planters, etc. These contracts were made on February 27, 1887. In the contract as to the mowers Underwood was appointed agent for their sale, and he was authorized to sell and retain all the proceeds over the price fixed in the contract which gave plaintiff the right at the close of the season

to require payment from Underwood of the price fixed for all the goods delivered to him. In the contract as to the plows and other implements the prices and terms of payment were fixed, the plow company retaining the right to take all the property unsold by Underwood as their own. Early in May, 1887, Underwood absconded, leaving the goods in controversy in care of one Grisson. About the middle of May creditors attached the goods. After such attachments, and which were known to plaintiff, they brought suit in Dade county, Missouri, against Underwood, for the full amount of all goods delivered to him, and obtained an order of attachment, and had the same levied on certain lands in that county. Ten days after the commencement of the suit for the purchase price the plaintiff commenced this action of replevin in Ness county. The theory of the plaintiff in the attachment suit was that it could amend its petition in that suit so as to claim only the property not recovered in the replevin suit, without affecting its rights in the latter suit. The plaintiff did amend its petition in the Dade county attachment suit so as to leave out all property in the replevin suit, and asked and obtained judgment only for the remainder. When these suits were commenced there was a want of definite and specific knowledge as to the exact amount of unsold goods. There was a verdict for the defendants, and the plaintiff appealed.

Lewis & Fierce, for the plaintiff in error..

George S. Redd and Buchan, Freeman & Porter, for the defendants in error.

746 ALLEN, J. While various questions are raised by the plaintiff in error on the rulings of the court as to the admission of evidence and on the instructions, it is only necessary to consider whether the plaintiff is entitled to recover on the conceded facts of the case. In the brief for the plaintiff in error two questions are asked: 1. Did the written contracts under which Underwood obtained the property constitute a sale from plaintiff to him? 2. If not, did the act of the plaintiff in bringing the attachment suit in Dade county, Missouri, have the effect to pass title to him? These questions will be considered in their order.

1. As to the Knowlton mowers, we think the contract was one of agency, under which the title to the mowers remained in the plaintiff until it elected to treat the transaction as a

sale to Underwood. As to the contract under which the plows and other implements were shipped to Underwood, we think it a contract of sale which passed to Underwood a title to the property in the first instance, subject only to be defeated by the actual exercise of the election of the plaintiff to retake the unsold property as its own, instead of notes of the plaintiff, as provided in the contract. This contract is, first, an order from Underwood to the plaintiff for the goods, to be paid for in installments, and upon terms stated in the order. This alone, if accepted by the plaintiff, would be a simple sale on credit. The only language in the contract under which the plaintiff can claim title is as follows: "All goods remaining unsold at the end of season to be settled for by ⁷⁴⁷ said Underwood's individual notes, due October 1, 1888, secured (if the Moline Plow Company so direct) by farmers' notes, or said unsold goods to be stored, free of charge, as the Moline Plow Company's property. Either settlement, as above, to be wholly optional with the Moline Plow Company." Until the Moline Plow Company exercised its option to recover the goods as its own property we think the title was in Underwood. There is no pretense that this option was exercised prior to the attachment of the goods by the defendant, and the levy on them as the property of Underwood was therefore valid.

2. As the title to the Knowlton mowers remained in the plaintiff until it by some subsequent act treated them as sold to Underwood, it becomes necessary to consider the effect of the attachment suit in Dade county, Missouri. It is not contended by the plaintiff that it could pursue both remedies—one for the recovery of the specific property, and the other for the price, at the same time; but the claim is, that inasmuch as the plaintiff was in ignorance as to the exact facts with reference as to what had been done with the mowers, it might commence an action for the purchase price of all of the property which had been shipped to Underwood, and thereafter amend its petition so as to leave out all property that might be reclaimed, the mere bringing of a suit for the purchase price did not operate as a complete and final election, if the plaintiff at the time intended to recover all of the property it could, and then obtain a judgment in the action only for the balance.

The plaintiff claims that it acted without definite knowledge as to the facts, and therefore is not bound by its appar-

ent election to sue for the value of the goods. It may be conceded that, if the plaintiff had been induced to bring the attachment suit by false information from Underwood, or the attaching creditors, as to what had become of the mowers, on discovery of the actual facts it might recover the specific property, and that an election induced by fraud would not be binding. This proposition finds support in these cases: *Hays* 748 v. *Midas*, 104 N. Y. 602; *Equitable etc. Foundry Co. v. Hersee*, 103 N. Y. 25; *Kraus v. Thompson*, 30 Minn. 64; 44 Am. Rep. 182. But, under the plaintiff's own showing, can it be said that the attachment suit was brought in ignorance of the facts? It appears from the testimony of T. B. Gorton, plaintiff's manager, that he learned that Underwood had placed a chattel mortgage on his property and absconded, and that he at once sent E. W. Daily to Ness City to look after the company's interest, to get security for what was owing the company, and to make disposition of the goods remaining on hand; that Gorton then went to Dade county, Missouri, and commenced the attachment suit without having accurate information as to the goods that had been sold by Underwood. The company thus had representatives at both places. It seems to have been plaintiff's purpose to pursue both remedies, knowing that it had both. Its only lack of knowledge as to the facts was want of definite and specific knowledge as to the exact amount of unsold goods.

It does not appear from the evidence that the plaintiff's agent, Daily, who went to Ness City, was not already in possession of accurate information as to the condition of the property there before the attachment suit was commenced. Daily was sent to Ness county to replevy the goods on hand. These instructions were given after Gorton knew that they had been attached, and before the attachment suit was commenced in Dade county. At the time the attachment suit in Dade county was commenced Gorton counseled with his attorneys as to the effect of bringing the replevin suit and the attachment suit at the same time, and the attachment suit was brought under the advice of counsel that both suits could be brought, and that plaintiff could afterward amend its petition in the attachment suit so as to claim only for the goods not recovered in the replevin action, without affecting its rights in the latter suit.

In view of all these facts shown by the plaintiff's own testimony it cannot be held that the plaintiff acted in ignorance

of its rights. That the two remedies are inconsistent is ⁷⁴⁰ clear. The plaintiff had no right to recover from Underwood the purchase price of goods which it had not sold to him, but elected to still retain. Unless the title had passed to Underwood it had no claim on him for the value. If the title had passed, it had no right to the goods. We think, under this contract, after Underwood had absconded, the plaintiff had the right to treat the season as closed, and the goods as sold to Underwood; that, in order to maintain an action for the price, it was not necessary that the plaintiff should wait until the expiration of the ordinary season for the sale of agricultural implements, nor that Underwood should have actually given or refused to give his notes in accordance with the contract, but that his acts were sufficient to authorize the plaintiff to treat the goods as sold to him, and bring an action for the purchase price. Having made its election with a knowledge at least of the more important facts affecting its rights, the plaintiff may not thereafter abandon its first election and choose the opposite remedy. An election, once fairly made by a party having the right to make it, is final and conclusive: *Fowler v. Bowery Savings Bank*, 113 N. Y. 450; 10 Am. St. Rep. 479; *Bailey v. Hervey*, 135 Mass. 172; *Crompton v. Beach*, 62 Conn. 25; 36 Am. St. Rep. 328; *Gray v. St. John*, 35 Ill. 222; *Nield v. Burton*, 49 Mich. 53. The subsequent amendment of the pleadings, and the fact that the plaintiff took judgment only for the goods actually sold by Underwood, under the authorities, cannot affect the rights of the parties in this case.

We think there was no substantial error in the ruling of the court on the admission of testimony, and that the instructions are quite as favorable to the plaintiff as the law will warrant. We do not see that the plaintiff could have been prejudiced by the instruction that a demand was necessary. The proof showed, without contradiction, that a demand was in fact made. None of these matters are important, in the view we take of the case, for, under the facts disclosed, the plaintiff cannot recover. The judgment is therefore affirmed.

All the justices concurred.

ELECTION OF REMEDIES.—ESTOPPEL: See *Johnson-Brinkman Com. Co. v. Central Bank*, 116 Mo. 558; 38 Am. St. Rep. 615, and note.

ELECTION OF REMEDY.—WHEN IRREVOCABLE.—If one has a choice between two inconsistent rights or remedies, and deliberately makes his choice, such election becomes conclusive upon him, and precludes him from subse-

quently pursuing the other right or remedy: See note to *Johnson-Brinkman Com. Co. v. Central Bank*, 38 Am. St. Rep. 626. For monographic note on, where election to prosecute one remedy bars resort to another, see *Thomas v. Joslin*, 1 Am. St. Rep. 626-629.

ELECTION OF REMEDY.—ACTION TO SUE FOR DELIVERY OF GOODS PRECLUDES an action for their purchase price: See the note to *Fowler v. Bowery Savings Bank*, 10 Am. St. Rep. 490, showing when the pursuit of one remedy is an irrevocable election not to pursue another.

SALE—OPTION TO RETURN GOODS PURCHASED.—TITLE PASSED, WHEN: See *Foley v. Felrath*, 98 Ala. 176; 39 Am. St. Rep. 39; note to *Johnson-Brinkman Com. Co. v. Central Bank*, 38 Am. St. Rep. 626. Transaction constitutes a sale at the election of the customer, when: See *People v. Cannon*, 139 N. Y. 32; 36 Am. St. Rep. 668.

PRIORITY OF ATTACHMENT LIEN OVER SALE PREVIOUSLY NEGOTIATED, but not consummated until after levy: *Young v. South Tredegar Iron Co.*, 85 Tenn. 189; 4 Am. St. Rep. 752.

STATE v. REED.

[58 KANSAS, 767.]

JURY TRIAL—DISCHARGE OF JURY.—While the discharge of a jury before the completion of a trial, without the consent of the accused, and without sufficient reason, ordinarily bars a further trial, yet if, after the commencement of a trial, the question as to the necessity of discharging one of the jurors on account of sickness was heard and determined by judicial methods, and a finding made that a discharge was absolutely necessary, the appellate court cannot say, in the absence of the evidence, upon which the discharge was granted, that there was not good cause for it, or that it should operate as an acquittal.

INFORMATION—INDORSEMENT OF NAMES OF WITNESSES.—The court does not abuse its discretion by allowing the prosecution to indorse, even upon the day of trial, the names of material witnesses for the state, where it appears that the attention of the defendant and of his attorneys had previously been called to these witnesses, and that inquiry had been made of them as to what their testimony would be.

JUROR—DISQUALIFICATION.—A juror is not shown to be disqualified from the fact that he did not pay any personal taxes for the preceding year where it does not appear that he was not upon the personal property assessment-roll, or that he did not own and pay taxes on real estate.

HOMICIDE—DYING DECLARATIONS.—A dying declaration uttered under a sense of impending dissolution is admissible in evidence, although death did not immediately ensue, and a hope of recovery was subsequently entertained.

HOMICIDE—MOTIVE.—On a trial for murder, where the theory of the prosecution is that the crime was committed because of defendant's passion for the wife of the deceased, and of criminal intimacy which existed between them, and of which deceased had knowledge, evidence as to such criminal intimacy is admissible, not only to prove a motive for the killing, but to show the degree or grade of the crime.

CRIMINAL LAW—EVIDENCE—ANOTHER OFFENSE.—Testimony tending to show the commission of another offense than the one charged is not, as a general rule, admissible; but, where such offense is intimately connected with the one charged, important proof to establish the latter cannot be excluded because it may tend to prove the former.

HOMICIDE—EVIDENCE.—On a trial for murder any thing that will throw light on the homicide, and every thing that might have influenced the mind of the defendant, may be shown in evidence.

HOMICIDE—EVIDENCE AS TO CONDUCT OF DECEASED—RES GESTÆ.—It is error on a trial for murder to admit testimony as to the manner and conduct of the deceased on the day previous to the killing, which were not known to the defendant, which were not connected with the homicide, and which could not, therefore, have influenced the defendant in the commission of the crime. They are not a part of the *res gestæ*.

SECONDARY EVIDENCE of the contents of a letter or paper is not admissible where the letter or paper itself is not produced, and its nonproduction is not accounted for.

HOMICIDE—EVIDENCE—LETTER OR PAPER.—It is error on a trial for murder to admit in evidence the contents of a letter or paper which is prejudicial to defendant, and about which statements have been made and introduced in evidence, where such statements were not made in defendant's presence, and where the letter or paper itself is wholly incompetent.

HOMICIDE—DEFENDANT AS WITNESS—CROSS-EXAMINATION OF.—On a trial for murder it is not permissible to cross-examine the defendant, as a witness, about his conduct fifteen years before the homicide, merely for the purpose of proving a previous act of adultery having no connection with the crime charged.

HOMICIDE—DYING DECLARATIONS.—Whether a dying declaration was made under a sense of impending death, and the admissibility of the same, are matters exclusively for the consideration of the court, and which it must decide as preliminary questions.

HOMICIDE—DYING DECLARATIONS.—After a dying declaration has been admitted in evidence its credibility is entirely within the province of the jury, who are at liberty to weigh all the circumstances under which it was made, including those already proved to the judge, in determining the preliminary question of admissibility, and to give the testimony only such credit as, upon the whole, they may think it deserves.

CRIMINAL LAW—SELF-DEFENSE.—A party who is unlawfully attacked by another may stand his ground, and use such force as reasonably appears necessary to repel the attack and protect himself. He is also justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they are.

HOMICIDE—INSTRUCTIONS.—The defendant having been convicted of murder in the second degree it is immaterial that the court failed to submit an instruction upon manslaughter in the second degree.

DEFENDANT was convicted of murder in the second degree, and appealed.

Isaac G. Reed, Charles J. Peckham, and Elliott & Woods,
for the appellant.

John T. Little, attorney general, C. J. Garver, county attorney, and W. H. Schwinn, for the state.

769 JOHNSTON, J. Isaac G. Reed was charged, in an information filed in the district court of Sumner county, with shooting and killing Isaac Hopper, in Sumner county, in such a manner and with such an intent as to constitute murder in the first degree. The information was filed on August 31, 1892, and on October 10, 1892, upon application of the defendant, a change of venue was granted, and the cause transferred to the district court of Cowley county for trial. The trial was begun in the latter court on January 10, 1893, and, after the impaneling of the jury, the production of the evidence for the state and for the defendant, the charging of the jury, after the opening argument in behalf of the state, and the argument in favor of the defendant, and before the closing argument for the state had been completed, on January 20th, one of the jurors became sick, and was unable to attend at the trial. The cause was continued from time to time for five days, and on January 26th, after an examination, and without the consent of the defendant, the court determined that it was impossible for that jury to conclude the trial, and thereupon it discharged the jury. At the next term of the court the plea of former jeopardy was interposed, and attached to it was the evidence taken by the court when the first jury was discharged; but the court sustained a demurrer, and ruled that the discharge of the jury, having been made necessary by the sickness of a juror, did not operate as a bar to a further trial. The trial then proceeded, and the defendant was convicted of murder in the second degree, from which conviction he appeals to this court, alleging numerous grounds of error. We will only notice those which seem to be material, or require attention at this time.

770 The first contention is, that the discharge of the jury first impaneled is equivalent to a verdict of acquittal. It is true that the jeopardy of the defendant began when the jury were impaneled and sworn, and the reception of evidence was commenced, and it is also true that the discharge of the jury without the consent of the defendant, and without sufficient reason, will, ordinarily, bar a further trial. The statute prescribes the grounds which will warrant the court in discharging a jury before the completion of a trial. It reads as follows: "The jury may be discharged by the court on account of the

sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing": Civ. Code, sec. 281. See, also, Crim. Code, sec. 208.

In this case the sickness of a juror was the cause for discharge, and whether that sickness was of such a character as to make a discharge absolutely necessary was the subject of inquiry and decision by the court. A court cannot arbitrarily determine such a question, but the incapacity of the juror and the necessity for discharge are to be heard and determined by judicial methods: *State v. Smith*, 44 Kan. 75; 21 Am. St. Rep. 266. That course was pursued in the present case, and the finding made by the court that such a necessity existed was based on the testimony of a physician and other evidence, some of which is not preserved. In the absence of that evidence we cannot say that there was not good cause for the discharge. From what appears we think that the court did not act capriciously, nor without a due regard for the rights of the defendant. After the illness of the juror was reported the court postponed the trial from day to day, in the expectation that the juror would recover sufficiently to complete the trial. Several inquiries were made as to his condition and the prospect of recovery. At the end of five days he was still seriously sick, and his recovery was a matter of great uncertainty. It is said that the near approach of the end of the term influenced ⁷⁷¹ the court, to some extent, in reaching the conclusion which it did. Of itself, this might not be sufficient to justify a discharge, but as the real inquiry was whether the sickness of the juror required the jury to be discharged, the finding of the court made upon this inquiry is necessarily binding upon us. As the testimony taken at the time of the discharge was made a part of the plea, and a demurrer thereto sustained, the question raised upon the reply to the plea is not deemed material.

Upon leave of the court, obtained without notice to the defendant, the state was permitted, at the time of the trial, to indorse upon the information the names of eight witnesses who gave material testimony in the case. This indorsement was made just before the trial, on April 5th, and it is contended that, as the testimony given by these witnesses was important, the action of the court in permitting the indorsement was an abuse of discretion, which resulted in prejudic-

ing the rights of the defendant. It appears that on the third day of February a motion was made to indorse the names of the new witnesses, which motion was sustained by the court. Afterward the names of these witnesses so indorsed were stricken from the information, and it was said that it was done upon the ground that the order for indorsing the names of witnesses was made in the absence of the defendant. It thus appears that the attention of the defendant and his attorneys was called to these witnesses, and, further, that inquiry had been made of them as to what their testimony would be. Under the circumstances it cannot be said that the court exercised its discretion without due regard for the rights of the defendant, or that he was prejudiced by the ruling.

Three jurors were challenged on the ground that they did not possess the requisite qualifications of jurors. The objection urged is, that their names did not appear on the tax-rolls of the county, and hence that they should have been excluded from the panel, upon the objection of the defendant. The showing made upon this point is not satisfactory. While it ^{was} appeared that these jurors did not pay any personal taxes for the preceding year, it was not shown that they did not pay taxes on real estate, nor that their names did not appear on the assessment-rolls of their respective townships. It appears that two of them were listed for personal taxes, but that the value of the personal property which each had for taxation did not equal the exemption allowed to him; and in the case of the third, he stated that he had made a return for a stock company as its manager and agent, but that he had not been assessed for personal taxes. Whether he was upon the tax-roll is not shown. No inquiry was made as to whether they had real estate listed in their names in the respective townships in which they lived, and nothing to show that they did not pay taxes on real estate for the preceding year: The statute provides for listing both personal and real estate in the name of the owner: Gen. Stats. of 1889, pars. 6889, 6911. It is further provided, that in making a list of persons to serve as jurors, the jury commissioners shall select from those assessed on the assessment-rolls of the several townships and cities of the preceding year: Gen. Stats. of 1889, pars. 3567, 3601. The evident purpose is to obtain the service of jurors who are substantial citizens and owners of property, and the assessment-rolls referred to in

the jury law are evidently those made in the listing of both real and personal property. As it does not appear that they were not upon the personal property assessment-rolls, nor that they did not own and pay taxes on real estate, this objection must be overruled: *State v. Commissioners of Rawlins County*, 44 Kan. 528. Other objections were made with reference to the jury, but an examination discloses that they are not material.

The next complaint relates to the ruling of the court in admitting what was received as the dying declaration of the deceased. Hopper was shot by Reed about 5 o'clock on the evening of May 21, 1892, and soon afterward was carried to his home, where an examination of his wound was made by physicians and surgeons, who informed him that his injury ^{was} was fatal, and admonished him that if he had any business matters which required attention he should attend to them, as he could not live long. He repeatedly expressed the opinion that he was about to die. A minister of the gospel was called in. He requested a neighbor to act as guardian for his children, gave information about insurance on his life, and directed how it and his property should be applied. He suffered intense pain, and at times cried out, "I am dying now." A stenographer was sent for, and a dying statement as to the shooting, and the cause of it, was taken down, which was afterward introduced in evidence. Some time after the statement was given he rallied some, and used language which indicated that he was then not without hope of recovery; but soon afterward he expired. It is claimed that, under the circumstances, the statement should not have been received in evidence. It is clear that the statement was made in the belief of impending death, and the fact that there was an interval of several hours between the time the statement was made and his death does not make it inadmissible. Nor will the fact that, at times after the statement was made, he entertained or expressed a hope that he might get well, render his declarations incompetent. The controlling question is, whether the declarations were uttered under a sense of impending dissolution, and the fact that death did not immediately ensue, or that a hope of recovery was subsequently entertained, will not affect their admissibility: 6 Am. & Eng. Ency. of Law, 117.

The admission of testimony showing the relations existing

between the defendant and the wife of the deceased, and which tended to show a criminal intimacy between them, is assigned as error. The defendant admits that proof of a criminal intimacy between the defendant and the wife of the deceased is admissible to show the existence of a motive for the killing, at least in cases where the killing has to be established by circumstantial evidence; and he insists that, as the killing was admitted, the motive of the defendant could be ⁷⁷⁴ shown in a general way, but that a detailed inquiry would create new issues, and tend to divert the minds of the jury from the consideration of the principal issue; the theory of the prosecution being that the homicide was committed by the defendant because of the passion which he entertained for the wife of the deceased, of which the deceased had knowledge, and that, as he stood in the way of defendant carrying out his desires and purposes, testimony of the relations which existed between them was competent upon the question of motive. Counsel for the state say that it has been "universally conceded, since David wrote to Joab, 'Set ye Uriah in the forefront of the hottest battle, and retire ye from him, that he may be smitten and die,' and the man who covets his neighbor's wife has a motive for desiring the death of his neighbor." The evidence is not only competent as tending to show the motive which induced the crime, but it is important also in determining the degree or grade of the crime that has been committed. As a general rule testimony tending to show the commission of another offense than the one charged is not admissible; but, where such offense is intimately connected with the one charged, important proof to establish the latter cannot be excluded because it may tend to prove that the defendant is guilty of another offense: *State v. Folwell*, 14 Kan. 105.

There may be some cause for complaint at the very extended inquiry that was made as to the relations between the defendant and Mrs. Hopper. A detailed inquiry was made, and a large volume of testimony was taken. It may be said, however, that this was due, to a large extent, to the fact that an undue intimacy between these parties was denied by the defendant. The testimony of the illicit relation, however, if it existed, was receivable in evidence as tending to show the motive of the defendant in killing the deceased: *Johnson v. State*, 24 Fla. 162; *Pierson v. People*, 79 N. Y. 424;

35 Am. Rep. 524; ⁷⁷⁵ *Commonwealth v. Merriam*, 14 Pick. 518; 25 Am. Dec. 420; *State v. Lawlor*, 28 Minn. 216; *State v. Hinkle*, 6 Iowa, 380; 9 Am. & Eng. Ency. of Law, 714; 15 Am. & Eng. Ency. of Law, 936.

A more serious objection is made to interviews and conversations held with the deceased some time prior to the shooting, when the defendant was not present, and of which he had no knowledge. A witness was permitted to detail at length a meeting between himself and Hopper on the day before the shooting, the taking of a long drive with the deceased, during which he related to witness his troubles at Wellington, and his plans for leaving that place and going to Missouri. He was allowed to testify what the mood and manner of the deceased were on that day, and to relate the reason given by the deceased for leaving Wellington. The reason stated was the interference in his family, and the trouble made by the defendant. Another witness, over objection, related that he had met the deceased on the next day, and had a conversation with him in the absence of the defendant, in which the deceased informed him, among other things, that he had determined to go to Missouri, and the reason given was, "that if he could get his wife away from where Judge Reed was they could get along all right together." The acts and conduct of the deceased previous to the fatal encounter which formed a part of the *res gestæ*, or which tended to throw light upon the question of motive or malice might be admitted in evidence; but the acts or conduct of the deceased which are not a part of the *res gestæ*, and which could not have influenced the defendant in the commission of the homicide, cannot be shown. The manner and conduct of the deceased on the day previous to the killing were not known to the defendant, and were not connected with the homicide, and therefore the defendant could not be affected thereby. Any thing that would throw light on the homicide, and every thing that would operate on the mind of the defendant, can be shown; but evidence of the acts or manner of the deceased which never came to the knowledge of the defendant could not be proved.

⁷⁷⁶ There was introduced in evidence a paper, identified by Mrs. Hopper, in which the deceased declared that he believed his wife to be a woman of honor, integrity, and high moral character, and that any accusations to the contrary

were false. To meet the introduction of this evidence by the defendant, the state was permitted to offer a witness, who related an occurrence between himself and the deceased, on May 1st, the day upon which the other paper was executed, in which the deceased presented to him a paper, which he said was prepared by Mrs. Hopper. He then gave a conversation between the deceased and himself with reference to the paper and its contents. After reading it over, the witness told the deceased that he would be a fool to sign it; that the paper was not prepared by Mrs. Hopper, but was prepared for the purpose of getting a divorce from him. A long conversation ensued, in which it was intimated, or would bear the construction, that a trap was being laid by the defendant and the wife of the deceased, so that, if trouble occurred or a divorce was asked for, the mouth of the deceased would be closed; and much of the contents of the paper was disclosed in the conversation. This testimony was wholly incompetent, and the objection of the defendant should have been sustained, and the motion to strike it out should have been allowed. If the testimony had been competent as an explanation of why the paper signed by the deceased came to be executed and delivered to his wife, it was still secondary evidence, and, if competent at all, the letter itself should have been produced, or its nonproduction accounted for. The paper itself, however, if in existence, was not competent proof, and the introduction of its contents was prejudicial error.

There is just ground for the complaint made by the defendant in permitting the state to cross-examine the defendant in regard to his early life. A great part of the testimony in the case was devoted to the question of whether the defendant sustained adulterous relations with the wife of the deceased, and on cross-examination he was required to relate the marital ⁷⁷⁷ relations between him and his first wife, having been married in 1868; that he was divorced from her in the spring of 1877; and to state the grounds upon which the divorce was granted. The inquiry was pressed so far that he was required to state that cruelty and adultery were charged against him, and an effort was made to show that his present wife was the co-respondent in that divorce suit, with whom adultery was charged, and that he was engaged to his present wife prior to the granting of the divorce from his first wife. Some of these direct questions were not required to be

answered, but the inquiry was pushed sufficiently far to leave the inference with the jury that the defendant had been guilty of another adultery, with a person other than the wife of the deceased, fifteen years before the occurrence of the homicide with which he was charged. A full cross-examination should be allowed upon any thing connected with the homicide, or which would affect the credibility of the defendant as a witness, but it is not competent to prove previous acts of adultery which have no connection with the offense charged, nor can evidence of improper conduct with other parties than those charged in the information, which happened in his early life, be given in evidence to sustain the present charge. We think there was an abuse of discretion in this extended cross-examination of the defendant.

Another ground of complaint is the instruction given by the court with reference to the effect of the dying declaration which was admitted in evidence. The court charged that "such declaration when made in the belief that death was imminent, and the deceased had abandoned all hope of recovery, is admissible; and in this case, if you should find from the evidence that the deceased made a declaration as to the encounter with defendant before his death, then the court instructs you, as a matter of law, that such declaration was made when deceased thought death was imminent, and he had abandoned all hope of recovery." The court further advised the jury that the weight to be given to the declaration, and ⁷⁷⁹ the credibility of the witness making it, ought to be governed by the ordinary rules of evidence, and, to determine the weight and credit to be given to the same, the jury can consider all the circumstances under which the declaration was made. The objection is that the court withdrew from the jury all considerations as to whether the declaration was made when the deceased thought death was imminent, and after he had abandoned all hope of recovery. The court must decide as a preliminary question whether the declaration was made under a sense of impending dissolution, and the admissibility of the same is exclusively for the consideration of the court; "but, after the evidence is admitted, its credibility is entirely within the province of the jury, who, of course, are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give the testimony

only such credit as, upon the whole, they might think it deserves": 1 Greenleaf on Evidence, sec. 160. While the court instructed the jury that they might take into consideration the circumstances under which the declaration was made, in another part of the charge the question of whether the deceased made the statement under the apprehension of speedy death was in effect excluded from their consideration. In passing upon the credibility of the statement the jury are entitled to consider whether as a matter of fact the deceased had lost all hope of recovery, and the instruction should have been modified in accordance with this view: *Starkey v. People*, 17 Ill. 17; *North v. People*, 139 Ill. 102; *State v. Cameron*, 2 Pinn. 490; *Varnedoe v. State*, 75 Ga. 181; 58 Am. Rep. 465; *State v. Banister*, 35 S. C. 290; *Lambeth v. State*, 23 Miss. 355; *Nelms v. State*, 13 Smedes & M. 506; 53 Am. Dec. 94; *People v. Green*, 1 Park. Cr. 11; *Walker v. State*, 37 Tex. 366; *Jones v. State*, 71 Ind. 66; *State v. Nash*, 7 Iowa, 847, 884.

Another complaint is with reference to an instruction given upon the subject of self-defense, in which the court told the jury that, if one is unlawfully attacked by another, he may ⁷⁷⁹ stand his ground and use such force as reasonably appears necessary to repel the attack and protect himself. The criticism is that the instruction given leaves the jury to infer that the appearances were to be judged by them, and not by the defendant. "A party assailed is justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they are": *State v. Howard*, 14 Kan. 175. While the instruction is not as explicit as it should have been, it is evident from other portions of the charge that the court meant that he might use such force "as at the time reasonably appeared to him to be necessary." Although the instruction is defective, we would hardly think that the error of itself was sufficient to require a reversal. In any future trial of the cause this omission can be corrected. There is a further complaint that the court failed to submit an instruction upon manslaughter in the second degree. As the instruction complained of related to a degree of crime inferior to that of which the defendant is convicted, this objection becomes immaterial: *State v. Dickson*, 6 Kan. 209; *State v. Potter*, 15 Kan. 302; *State v. Rhea*, 25 Kan. 576; *State v. Yarborough*, 39 Kan. 588. Further than that, how-

ever, we think the testimony was not such as to justify the court in submitting an instruction as to that grade of offense.

Other criticisms are made upon the charge of the court, but in them we find no error, nor any thing which requires further comment. For the errors referred to, the judgment will be reversed, and the cause remanded for another trial.

All the justices concurred.

INDICTMENT.—THE PROSECUTION MAY ADDUCE A WITNESS AT THE TRIAL whose name is not indorsed upon the indictment, if he was not examined before the grand jury at the time the indictment was found: *State v. Abraham*, 6 Iowa, 117; 71 Am. Dec. 399, and note.

HOMICIDE—DYING DECLARATIONS.—GENERAL RULE AS TO ADMISSIBILITY OF: *State v. Furney*, 41 Kan. 115; 13 Am. St. Rep. 262, and note; *State v. Moody*, 2 Hayw. 31; 2 Am. Dec. 616. A dying declaration is not admissible if it appears that the declarant had the slightest hope of recovery, although he dies within an hour afterward: *People v. Hodgdon*, 55 Cal. 72; 36 Am. Rep. 30. But the fact that he did not die immediately afterwards does not render the declaration inadmissible: *Commonwealth v. Cooper*, 5 Allen, 495; 81 Am. Dec. 762, and note; *People v. Vernon*, 35 Cal. 49; 95 Am. Dec. 49, and note.

HOMICIDE.—PROOF OF ADULTEROUS INTERCOURSE of the prisoner with another woman is admissible to rebut the presumption that he was not the murderer of his own wife: *State v. Watkins*, 9 Conn. 47; 21 Am. Dec. 712.

CRIMINAL LAW—EVIDENCE—ANOTHER OFFENSE.—In criminal prosecutions evidence of other offenses is not necessarily incompetent. If a connection is shown it is admissible: *Farris v. People*, 129 Ill. 521; 16 Am. St. Rep. 283, and note; *Commonwealth v. Campbell*, 7 Allen, 541; 83 Am. Dec. 705. Such evidence is admissible to show motive, interest, or guilty knowledge. See note to *Barkly v. Copeland*, 5 Am. St. Rep. 418.

HOMICIDE—EVIDENCE.—ON A PROSECUTION FOR MURDER all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, should be excluded: *Farris v. People*, 129 Ill. 521; 16 Am. St. Rep. 283. But all matters in any way part of the *res gestae* are admissible: *Still v. State*, 91 Ala. 10; 24 Am. St. Rep. 853. Compare monographic note on *res gestae*, in *People v. Vernon*, 95 Am. Dec. 51-76.

EVIDENCE—CONTENTS OF LETTER.—Parol evidence of the contents of a letter is inadmissible unless the letter is produced, or its loss or destruction accounted for: *Rumbough v. Southern Imp. Co.*, 112 N. C. 751; 34 Am. St. Rep. 528; collected cases in note to *Kentzler v. Kentzler*, 28 Am. St. Rep. 24.

CROSS-EXAMINATION OF DEFENDANT IN CRIMINAL PROSECUTIONS: See monographic note to *State v. Duncan*, 38 Am. St. Rep. 895-898.

HOMICIDE—DYING DECLARATIONS.—HOW MADE, AND ADMISSIBILITY OF IN EVIDENCE as preliminary questions for the court: *State v. Johnson*, 118 Mo. 491; 40 Am. St. Rep. 405, and note.

HOMICIDE—DYING DECLARATION.—CREDIBILITY OF IS FOR THE JURY: *McDaniel v. State*, 8 Smedes & M. 401; 47 Am. Dec. 93; *People v. Smith*, 104 N. Y. 491; 58 Am. Rep. 537.

HOMICIDE—SELF-DEFENSE.—GENERAL RULE: See *Commonwealth v. Breyer*, 160 Pa. St. 451; 40 Am. St. Rep. 729, and note, 732. Right of accused to rely on facts as they appeared to him: *People v. Lennon*, 71 Mich. 298; 15 Am. St. Rep. 259, and note. Note to *Carter v. State*, 28 Am. St. Rep. 952.

HOMICIDE.—INSTRUCTION AS TO MANSLAUGHTER IS NECESSARY WHEN: See note to *Croom v. State*, 21 Am. St. Rep. 187; *Carter v. State*, 28 Am. St. Rep. 952.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

LOUISVILLE BANKING COMPANY v. EISENMAN.

[94 KENTUCKY, 88.]

CORPORATION SOLE—POWER TO CREATE.—One person cannot, under a statute providing that “any number of persons may associate themselves together and incorporate,” conduct his ordinary business in the name of a corporation sole formed by himself alone, so as to exempt him from personal liability, or his property not embraced by or used in his corporate business, from the payment of a debt, for no other reason than its being a debt of the corporation.

CORPORATIONS—LIABILITIES OF SHAREHOLDERS.—The sole owner of the stock of a corporation continuing to do business as such is not personally liable on indorsements of drafts made by him in the name of the corporation, when no fraud is practiced and all the parties to the transaction act in the belief that the corporation alone is liable.

CORPORATIONS—LIABILITY OF SOLE OWNER OF STOCK.—The purchase by one stockholder of all the stock in a corporation does not destroy the existence of the corporation. It merely suspends its franchise until the stock may be transferred to others. While in the hands of such purchaser the corporate and individual property are ordinarily alike liable for the debt of such sole owner, and subsequent purchasers of stock take it subject to the liens or equities of the creditors of the sole owner created prior to the transfer of the stock to them, but his individual property is not liable for debts created by him on behalf of, and in the name of, the corporation.

CORPORATIONS—DISSOLUTION.—THE PURCHASE BY ONE STOCKHOLDER OF ALL THE STOCK of a corporation does not dissolve the corporation, and place all the corporate property on the same footing with the other estate of the individual stockholder.

CORPORATIONS—LIABILITY OF STOCKHOLDER FOR UNPAID STOCK.—Failure to pay up all stock of a corporation required to be paid before beginning business does not, in the absence of fraudulent purpose, render one who has become the sole owner of the stock personally liable for corporate debts incurred after the corporation has been doing a prosperous business as such, and when the stock paid in, together with the assets, is amply sufficient to pay all prior existing indebtedness.

Barnett, Miller & Barnett and Bright & Brandeis, for the appellant.

B. K. Marshall, for the appellees.

⁸⁵ PRYOR, J. A corporation, styled the "Eisenman Bros. & Co.," was organized under chapter 56 of the General Statutes for the purpose of engaging in the milling business and the purchase of grain, etc. The incorporators were Jacob Krieger, Sr., David Frantz, Sr., and J. C. Eisenman. The capital stock of the corporation was fifty thousand dollars, and by its terms the corporation could begin business when two-fifths of its stock had been paid in. There is some conflict in the testimony as to whether as much stock as twenty thousand dollars had been paid when the corporation began to deal with the public, and we shall assume, ⁸⁶ for the purposes of this case, that only fifteen thousand dollars of paid-up stock was in the vaults of the corporation at that time. J. C. Eisenman, the appellee here, purchased up the stock of the corporation, and became the sole owner of all the stock and the corporate property. This purchase was made in January, 1889. The appellee, on account of his individual indorsements for the corporation, made an assignment to the Germania Safety Vault and Trust Company, and the assignee instituted this action for the purpose of settling up the estate assigned, and its distribution among creditors. On the — day of October, 1889, the corporation also transferred its assets to the trust company for the payment of its debts. In the months of September, October, and November of the year 1889 a firm known as J. C. Mattingly & Sons, engaged in the manufacture and sale of whisky, drew their drafts on the corporation of Eisenman Bros. & Co. for large sums of money, amounting in all to about twenty thousand dollars. The drafts were accepted by the corporation, indorsed by Mattingly & Sons, and discounted by the Louisville Banking Company, the appellant in this case, and placed to the credit of J. C. Mattingly & Sons. The corporation of Eisenman Bros. & Co. had no interest in the loans, but had accepted the paper for the accommodation of J. C. Mattingly & Sons, and of that fact the appellant, from the facts and circumstances of this case, must have been fully apprised, and but for the failure of Mattingly & Sons the corporation of Eisenman Bros. & Co. would have continued solvent.

⁸⁷ The appellant instituted its action at law and recovered

a judgment against the corporation of Eisenman Bros. & Co. on the paper of Mattingly & Sons, and had an execution issued with a return of no property found. Having been made a defendant to the action for a settlement of the estate of the appellee by his assignee, the Germania Trust Company, the appellant is seeking to make J. C. Eisenman liable in his individual right for the amount of the Mattingly notes upon two grounds: 1. The corporation of Eisenman Bros. & Co. practiced a fraud on the public when it announced that it had two-fifths of its capital stock paid in; 2. That J. C. Eisenman having purchased all the stock of the corporation, the corporation ceased to exist; and the latter having indorsed or accepted the paper, although in the corporate name, will not be allowed to say that it was a corporate liability, and more particularly when the fact of Eisenman being the sole owner of the stock was unknown to the appellant.

The formation of this corporation, of which the appellee was a member, was had under the General Statutes, and it is proper, therefore, to refer to some of the provisions of the statute on that subject in order to a correct decision of the questions made by the appellant.

Section 1 of chapter 56 of the General Statutes provides that "any number of persons may associate themselves together and become incorporated for the transaction of any lawful business, except banking and insurance, and for the construction of railroads; but such incorporation shall confer no powers or privileges not ^{ss} possessed by natural persons, except as hereinafter provided."

It is, we think, manifest the legislature never intended to permit one person to conduct his ordinary business in the name of a corporation so as to exempt him from personal liability, or his property not embraced by or used in his corporate business, from the payment of a debt for no other reason than its being a debt of the corporation. The purpose of the statute was to enable two or more persons possessed of capital or skill to associate themselves in business, and to limit their liability as against the improvident acts of each other, or the act of the corporation, in the event of pecuniary loss in the legitimate and proper conduct of its business. It invites the investment of the capital stock of one to be placed in the same business with the skill of another, or a combination of capital that encourages trade, the burden of

which mere individual enterprise would be unwilling to assume, and it could not have been the legislative intent that any one man could form a corporation of which he is the creature and sole stockholder, so as to limit his liability for debts contracted and from which he has derived the benefit, to the extent only of what he might designate his corporate estate. He owns the entire property belonging to the corporation: it is his. He can sell or dispose of it as he pleases, borrow money, acquire property in the name of the corporation, for the sole purpose of exempting him from any responsibility other than that belonging to the corporation; and, however reckless or improvident he may be, he has ⁸⁹ all to gain and nothing to lose. He could make a gift of the entire corporate estate, dispense with all corporate forms, and to say when exercising such unlimited control he is not personally responsible for every debt he contracts would be to pervert the plain purpose of the statute.

There is no such being in this state as a sole corporation, and certainly none such allowed to be created by the statute.

This corporation, however, was properly organized, had its several stockholders and board of directors, and was prospering in its business until these drafts were drawn for the benefit of Mattingly & Sons. The drafts were all made payable at the Masonic Savings Bank, and no direct transaction was had by the appellee and the appellant with reference to the paper. There is, in fact, no evidence showing that the corporation ever authorized the acceptance of these drafts, and while the paper was negotiable, if the corporation actually existed, its liability on the paper might well be questioned. The appellant, however, maintains that this appellee, when he signed the corporate name to these drafts, was the sole owner of the stock, and that from the moment he purchased the stock of Krieger and Frantz the corporation ceases to exist.

The corporation may have been virtually dissolved, and yet we are not disposed to hold the appellee personally liable for the amount of the drafts discounted by the bank. That both the appellant and appellee were acting on the belief that the corporation was alone liable is beyond dispute, and the corporation, as it was called, the appellee being the sole ⁹⁰ owner of the stock, submitted to a judgment against it for the drafts in an action by the bank, and the appellee is making no resistance to its payment out of the property of

the corporation, but insists that no personal liability exists. The appellant has obtained all he contracted for. There was no fraud practiced upon it by the appellee, and certainly no intention to bind himself personally, nor any of the proceeds of these drafts applied to his benefit in any manner, or to the benefit of what he supposed was an existing corporation. If the stock had been held as it was originally, the pecuniary condition of the corporation would have been the same, as no act had been done by the appellee by which the interest of creditors or those dealing with the corporation would have been prejudiced. Nor are we prepared to adjudge, after a corporation has been created by the statute, with the stock distributed among several stockholders, that the purchase by one stockholder of all the stock destroys the corporate existence, and places all the property of the corporation upon the same footing with the other estate of the individual stockholder. The legal title to the estate of the corporation is still vested in it, and while the stockholder's interest could be subjected to the payment even of his individual debt, when he contracts in behalf of the corporation, and with no fraudulent intent, it seems to us the party with whom he contracts gets all he bargains for when he subjects the corporate property to the payment of his debt.

In the case of *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, Cruikshanks owned all the stock of the corporation and ⁹¹ executed a mortgage on the corporate property to Swift to secure the latter in the sum of seventeen thousand dollars loaned the corporation. The mortgage was signed by Cruikshanks in his own name and that of the corporation, and subsequently Cruikshanks sold shares of stock to third parties, who claimed that this mortgage executed by the sole owner, Cruikshanks, had no precedence over their stock; that it was the individual act of Cruikshanks, and not that of the corporation. The court held that the stockholders took their stock subject to the mortgage, and said that whether in the name of the corporation or the individual stockholder, the latter being the absolute owner in equity if not in law, the mortgage was effectual, and the subsequent purchasers of stock took their interests in the corporate property with the equities or encumbrances placed upon it when Cruikshanks was the sole owner. It is said in that case that "while the purchase by Cruikshanks of all the stock in the corporation, and all its property, did not necessarily work a

surrender of the franchise, it did virtually, for the time being, suspend its operation as a corporation until the election of new officers through new stockholders purchasing from Cruikshanks. If, from the moment Cruikshanks became the real owner, he had concluded to transact the business as an individual, and without the corporate name, can it be doubted that the mortgage created a valid equitable lien on the property," etc.

The case cited comes nearer adjudging that a purchase of all the stock by one stockholder dissolves ⁹³ the corporation than any we have found, and still such an act, in the light of the opinion, only suspends the operation of the charter, and places the stockholder in a condition where he may abandon its provisions and control the property as his individual estate.

In the case before us there was no surrender of the franchise, but the business conducted in good faith and under the belief that the corporate estate was alone liable. The corporation still lived and had such vitality as enabled the holder of the stock to transfer it, and proceed with the corporate powers as if he had never become the sole owner; and the argument that such a construction as to the meaning of the statute would enable two or more to organize a corporation, with a view of vesting the entire stock in one of the corporators, is not available, for the reason that the corporate property in the hands of one stockholder, when made liable by him for his corporate or individual debts, remains so, although he may transfer the stock to others, as they must take it subject to the encumbrances the sole stockholder has placed upon it prior to his sale of the stock. It must be recollected that we are determining alone, in this case, the meaning of the statute under which these corporations are formed; as it is plain, as to both public and private corporations, unless otherwise provided by the charter, the title to the corporate property still remains in the corporation, although one may become the sole owner of the stock. In *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, it was held that one having purchased all the ⁹³ stock of a private corporation does not thereby become the owner of the property, and to maintain replevin must bring the action in the corporate name. In *Wilde v. Jenkins*, 4 Paige, 481, it is said: "A conveyance of all the stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on the business

under the act of incorporation and in the corporate name." In *Winona etc. R. R. Co. v. St. Paul R. R. Co.*, 23 Minn. 359, it is said: "The corporation is still the absolute owner, and vested with the legal title to the property, and the real party in interest, although another party has become the sole beneficial owner in its rights, property, and immunities." The elementary writers on the subject all concur in holding that the fact of one person becoming the owner of all the shares of stock does not work a dissolution of the corporation: Cook on Stocks and Stockholders, 2d ed., sec. 631; Morawetz on Private Corporations, 635.

While we recognize the general rule on the subject sustained by the authorities referred to, it must be held that the purchase by one of all the shares in a corporation created under the statute is a dissolution of the corporation, to the extent that it suspends the exercise of the rights under the franchise until the owner transfers the stock, in good faith, so as to maintain an organization under the statute. There is a difference between the attempt to create one person a corporation under this statute and the purchase in good faith of all the stock after the corporation has been created. In the first instance there is no corporation, and in the last there is a franchise, the ²⁴ operations of which are suspended until the stock may be transferred to others; and while in the hands of one person the corporate and individual property are ordinarily alike liable for the payment of any debt contracted by the owner, and subsequent purchasers of stock take it subject to the liens or equities of the creditors of the sole owner created prior to the transfer of the stock to them.

In the present case, as before stated, there had been no change in the property or conduct of the business as to mislead or injure creditors. No fraud had been practiced by the appellee, and the entire credit was not only given the corporation, but the appellant had pursued it to judgment, and, when in a court of equity, the appellant should be confined in distributing the property of the corporation to its *pro rata* share of the proceeds, and neither the individual estate of the appellee assigned for the benefit of creditors or the appellee made personally liable for these debts to the bank.

It is said the appellee is liable to the corporation for stock subscribed and unpaid, and, if so, his liability to the corpo-

ration exists, and the amount of stock owing by him, when collected, becomes a part of the corporate assets, to be distributed among the creditors of the corporation. The appellant is not entitled to the whole, unless it is the sole creditor, and so the chancellor below adjudged. The statute makes the members of the corporation, or such of them who are guilty of intentional fraud in failing or refusing to comply substantially with the articles of incorporation, liable to an indictment, and it is urged in argument ⁹⁵ that the failure to pay up all the stock agreed to be paid by the act of incorporation was a fraud on the appellant, who did not deal with the corporation until long after it began to do business. If the stock was not paid up, this, in the absence of a fraudulent purpose, did not make the stockholder individually liable for all the debts of the corporation; and besides, the proof shows that the stock paid in and the assets of the corporation were amply sufficient to pay all the indebtedness, excepting the drafts drawn by Mattingly & Sons, and this indebtedness was created long after the corporation had been organized and was conducting a prosperous business. This view of the question is sustained by the case of *First Nat. Bank v. Almy*, 117 Mass. 476.

We perceive no reason for reversing the judgment below, and the same is affirmed.

Judge Pryor delivered the following response of the court to a petition for rehearing:

There is a manifest distinction between this case and *Brannin v. Loving*, 82 Ky. 370. In that case the corporation for its own benefit drew on Spillman & Mitchell for five thousand dollars. The paper was accepted by them for accommodation, and afterward indorsed to Brannin & Co. by the president of the corporation, who knew the condition of the corporation, and that he was violating the provisions of the charter. In this case the corporation of Eisenman ⁹⁶ & Bros. were the acceptors for accommodation only, and it is apparent the bank knew it; and not only so, the bank pursued the corporation to judgment, and is now in a court of equity seeking to subject not only the assets of the corporation, but to make its president personally responsible for the debt.

The good faith of the appellee cannot be questioned. The appellant obtained all it bargained for, and there is no rea-

son for fixing an individual liability on Eisenman for this debt.

Petition overruled.

CORPORATION—PURCHASE OF ENTIRE STOCK BY ONE PERSON.—The ownership by one person of all the stock of a private corporation aggregate virtually dissolves the corporation: *Bellona Co's case*, 3 Bland, 446, cited in *Swift v. Smith*, 65 Md. 428; 57 Am. Rep. 340; for the time being it certainly does suspend corporate action, although, according to the now generally received understanding of the law, the sole owner may dispose of some of his stock to others, and continue the corporate existence by the election of necessary officers: *Russell v. McLellan*, 14 Pick. 70; *Newton Mfg. Co. v. White*, 42 Ga. 148; Boone on Corporations, secs. 199, 200, all of which is cited in the opinion to *Swift v. Smith*, 65 Md. 428; 57 Am. Rep. 340. The loss of an integral part of a corporate body may suspend, but does not extinguish, the corporate franchise: *Lehigh Bridge Co. v. Lehigh Coal etc. Co.*, 4 Rawle, 9; 26 Am. Dec. 111. A change in the stockholders of a corporation has no effect upon its legal status. It remains through all changes in the personnel of its stockholders the same legal entity, possessed of the same legal rights, and subject to the same liabilities: *Barrick v. Gifford*, 47 Ohio St. 180; 21 Am. St. Rep. 798.

CORPORATIONS.—STOCKHOLDER'S LIABILITY FOR UNPAID SUBSCRIPTIONS TO STOCK: See the extended note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 810, 829.

NEWMAN v. MOORE.

[94 KENTUCKY, 147.]

A MARRIED WOMAN IS ESTOPPED from interposing her inability to contract, in bar of the consequences of her fraud.

MARRIED WOMEN—LIABILITY UNDER CONTRACT TO CONVEY.—If a married woman refuses to comply with her contract to convey land it may be subjected to the payment of the amount of the purchase price paid by the purchaser, and her assignee of the notes for deferred payments of the purchase price may subject the land to the payment of the amount paid by him for the notes, but no more, the measure of his recovery being the extent to which he is actually injured or damaged.

ACTION—APPEARANCE.—A defendant in a cross-petition who files exceptions in open court to the commissioner's report thereon thereby makes an appearance, and cannot successfully plead that he has not been duly summoned.

R. W. Holland and J. T. Simon, for the appellant.

J. H. Barker and L. T. Applegate, for the appellees.

147 HAZELRIGG, J. While a contract between a married woman and another may not be enforced specifically, yet not even a married woman may so conduct herself as to defraud another and escape responsibility if, in the nature of things, reparation can be made.

¹⁴⁸ She will not be allowed to take advantage of her own wrong, and will be estopped from interposing her inability to contract, in bar of the consequences of her own fraud.

In this case Mrs. Moore, in conjunction with her husband, sold and covenanted to convey her land to I. C. Lowe. She received two hundred and fifty dollars of the purchase money, accepted and sold the notes for the remaining purchase price of her land; she put the purchaser in possession, and then refused to convey.

Upon this state of case her land—the subject matter of her attempted contract—may be subjected to the payment of the sums paid by Lowe, the purchaser. Also to the sum paid by Newman for the notes on Lowe, who refuses to pay them only because he can get no title to the land.

It is contended by Newman that he should recover the full face value of the notes, and so should he if he paid that for them. The measure of recovery is the extent to which he is actually injured or damaged. He must be made whole—reimbursed to the extent of his loss. Mrs. Moore's liability arises, not by reason of the contract of assignment and sale of the notes, but out of the equity fixing her responsibility at a price equal to that expended by the victim of her fraud. Any other criterion of damage would amount to the specific enforcement of a void contract.

She insists, however, that she was not summoned on the cross-petition of Newman, and that he is, therefore, not entitled to any relief against her. But she filed ¹⁴⁹ exceptions in open court to the commissioner's report, fixing the amount coming to Newman, which were sustained by the court, and as she thus took part in the trial, and by her exceptions combated the claim set up in Newman's action, she cannot be allowed to say that she was not in court. She cannot appear in court and attempt to defeat the purpose sought to be effected by the cross-petition, and yet shelter herself behind the plea that she has not been summoned. We think she thereby entered her appearance.

The judgment below fixing the amount due Lowe need not be disturbed, save in so far as the accumulation of rents, if any, on the one side, and of interest on the other, may be taken into the account; but to the extent that Newman is denied relief it is erroneous. The issues attempted to be raised by the reply of Lowe are, so far as he is concerned, wholly immaterial, but, on a return of the case, if Mrs. Moore

desires to plead further, she may be allowed to do so, the object of further investigation being the ascertainment of Newman's actual loss growing out of his purchase of the Lowe notes.

Wherefore, the judgment below is reversed, with directions to allow the case to proceed in accordance with the principles herein announced.

MARRIED WOMEN—ESTOPPEL—DISABILITY TO CONTRACT AS A DEFENSE. Married women are estopped by their conduct when the enforcement of the principles of estoppel are necessary for the protection of those with whom they deal, although there are limitations upon the application of this doctrine: *Dobbin v. Cordiner*, 41 Minn. 165; 16 Am. St. Rep. 683, and note. A married woman is estopped from denying her representations made to a mortgagee, who, acting in good faith, and not knowing that the facts stated are untrue, is induced by those representations to take a mortgage upon her real estate: *Lane v. Schlemmer*, 114 Ind. 296; 5 Am. St. Rep. 621, and note. A married woman cannot profit by her own fraud to the prejudice of a bona fide purchaser from her: *McDanell v. Landrum*, 87 Ky. 404; 12 Am. St. Rep. 500, and note. A married woman who represents to a creditor that articles purchased are for the use of her separate estate will be afterwards estopped from disputing that representation, unless it appear that the creditor knew at the time that such representation was untrue: *Brown v. Thompson*, 31 S. C. 436; 17 Am. St. Rep. 40, and note. This question will be found thoroughly discussed in its various phases in the notes to the following cases: *Cook v. Walling*, 10 Am. St. Rep. 21; *Wiseman v. Macy*, 83 Am. Dec. 318; *Shivers v. Simmons*, 28 Am. Rep. 374; *Hand v. Hand*, 58 Am. Rep. 7, and *Cravens v. Booth*, 58 Am. Dec. 114.

PROCESS.—WAIVER BY APPEARANCE: See *Baisley v. Baisley*, 113 Mo. 544; 35 Am. St. Rep. 726, and note, and *German Bank v. American etc. Ins. Co.*, 83 Iowa, 491; 32 Am. St. Rep. 316, and note, with the cases collected.

GREER v. LOUISVILLE AND NASHVILLE R. R. Co.

[94 KENTUCKY, 169.]

RAILROADS—GROSS NEGLIGENCE.—ABSENCE OF SLIGHT care in the management of a railroad train is gross negligence.

RAILROADS—NEGLECT—EVIDENCE.—When, in an action against a railroad company, the only negligence alleged relates to the act of driving or operating a train, it is prejudicial and reversible error to admit evidence as to the unsafe and defective condition of the track, or of any portion of the train's makeup, or of plaintiff's physical condition.

NEGLECT—MEASURE OF DAMAGES—LIFE TABLES AS EVIDENCE.—In an action to recover damages for permanent personal injury arising from negligence standard life tables are admissible in evidence to show the expectancy of life, and the probable duration of ability to labor, and earning capacity of one of the age of the injured party, as a basis upon which to estimate the amount of damages he should recover. But this

proof must be taken subject to the conditions surrounding the individual under investigation.

DAMAGES—EARNING CAPACITY AS EVIDENCE.—In actions to recover for personal injury caused by negligence the plaintiff may prove his previous physical condition and ability to labor, or follow his usual vocation, as well as his condition since the injury, in order to enable the court or jury to properly find the pecuniary damage sustained.

NEGLIGENCE—MEASURE OF DAMAGES.—In actions to recover for permanent personal injury arising from negligence the jury should be instructed, in estimating the amount of the damages, to take into consideration the age and situation of the injured party, his earning capacity, and its probable duration, his bodily suffering, and mental anguish resulting from the injury, the loss sustained by the want of the limb injured, and the extent to which he is disabled from making a support for himself by reason of the injury received.

MASTER AND SERVANT—COSERVANTS—NEGLIGENCE.—To entitle a servant to recover of his master for the negligence of another servant associated with him in the same department of service he must allege and prove that such other servant was his superior in point of authority and control, and that the negligence was gross.

MASTER AND SERVANT—FELLOW-SERVANTS.—A fireman on a railroad train, while acting as engineer, is a superior employee to a brakeman thereon.

RAILROADS—LIABILITY FOR NEGLIGENCE OF SUPERIOR SERVANT.—A brakeman on a railroad train assumes the ordinary risks of going between moving cars; such risk is necessarily open and visible, but the company is liable for the gross negligence of its conductor and engineer, in failing to exercise any care for the protection of the brakeman while thus engaged.

H. P. Cooper, for the appellant.

W. J. Lisle, for the appellee.

¹⁷¹ HAZELRIGG, J. James Greer, as plaintiff in the lower court, brought this action against the Louisville and Nashville Railroad Company for negligently driving its car or cars upon and over his leg, crushing it in such manner as to cause its necessary amputation, and alleging that, by reason of the defendant's negligence, plaintiff lost his left leg, and endured great mental and physical suffering, etc., to his damage in the sum of twenty-five thousand dollars. He recovered the sum of two thousand five hundred dollars. Thereupon the defendant prosecuted an appeal to the superior court, and the plaintiff prosecuted one to this court. On plaintiff's ¹⁷² motion the case in the superior court was transferred here, and the two appeals—being one and the same case—are heard together.

At the Lebanon switchyard, on the line of defendant's road, it became necessary to place two gondola cars on one of the side tracks, and some box-cars on another. There was

some haste required, as the conductor's purpose was to keep from being held there by the next train going south. So Greer was directed by the conductor, when asked if he wanted the cars placed back against the "dead" cars, "to just drop them in clear of the main track," as he was in a hurry. "Dropping them back" meant "to cut them loose whilst moving, so that the loose cars would roll back to their place by the dead ones." The conductor then signaled the engineer to back in, and, it appears left, going south several car lengths toward the depot, and when the accident happened was engaged in chalking some cars to indicate their destination. The plaintiff went in to uncouple or cut loose the two cars in obedience to the instructions as he understood them, not knowing but that the conductor was near at hand to protect him. He found the pin crooked, so that he could not pull it out, and walked with one foot on the outside and the other on the inside of the track for some fifteen or twenty feet, when, as affording him more strength for extricating the pin, he brought both feet within the rails of the track, and, after taking a step or two, his foot caught on the end of the guardrail, or, as testified to by him, "a splinter on the guardrail at the frog of the switch stuck into the toe of his shoe." With his right ¹⁷³ hand he had hold of the car in his front, and pulled his foot loose, but, losing his balance, was dragged some distance, when he fell to the ground on his hands and feet, and ran in that way some distance. From the guardrail splinter to where he finally threw his body from under the car when his foot was caught was some twenty-five yards. When he went in to uncouple the cars he testifies they were moving at the rate of about two miles an hour, but their speed was increased rapidly, and they were going, when plaintiff was injured, about five miles per hour. The train struck the "dead" cars violently, knocking them back some seventy feet. A fellow-brakeman was on top of one of the box-cars, and saw Greer when he first started to fall, and testifies that he got down off the car and ran out on the opposite side from him in order to signal Martin, the fireman, who had been left in charge of the engine by the regular engineer. The fireman was waiting for signals, and appears to have known nothing of the trouble until it was about over.

In this connection it may be observed that the company introduced an order or certificate of its master mechanic, of

date December 11, 1890, to the effect that Martin was declared competent, and was authorized to handle an engine as per rule 207, which made it "the duty of an engineer to handle his engine at all times, but a fireman may do so at a station in the immediate presence of the engine-man, provided the master mechanic has declared him competent."

This declaration of competency was some six weeks after Martin had been left in charge of this engine, in violation, it appears, of rule 207.

¹⁷⁴ Upon this state of case the defendant company moved the court for a peremptory instruction in their behalf, which, we think, was properly overruled. That there was some negligence we have no doubt, and that, too, on the part of employees superior to the plaintiff in point of employment and control of the train. It is true that there must have been gross negligence in this case before the plaintiff can recover, but, as was said in *Louisville etc. R. R. Co. v. Mitchell*, 87 Ky. 337: "Certainly, the absence of slight care in the management of so dangerous an agency as a railroad train is gross negligence."

On the trial much prominence was given to the testimony of various witnesses as to the condition of the guardrail, the crooked pin, and the injured condition of plaintiff's arm. This testimony was objected to by the defendant, and we think the objection should have been sustained. These circumstances, if regarded as a mere matter of detail, or as incidents of the transaction, might not have been objectionable, as it is hardly possible to detail the occurrence without stating all the conditions and surroundings as they existed at the time. But witnesses were introduced solely on these matters, and for the express purpose of making them the basis of a claim for damages. This was not proper under the pleadings. The unsafe or defective condition of the track, or of any portion of the train's makeup, or the sprained condition of plaintiff's arm, was not the subject matter of inquiry; these defects were not alleged as grounds of complaint, or as matters of negligence. ¹⁷⁵ Nor are they so connected or interwoven in any way with the act of driving or operating the train—the only negligence charged in the petition—as to be the proper subject of testimony. That its introduction was prejudicial to the defendant is apparent; indeed, the argument of plaintiff's counsel in this court consists largely in denouncing the negligence of defendant, as shown by the

unsafe track and the crooked pin. What must have been his appeal to the jury? And while these alleged evidences of negligence are not made the subject of an instruction, and for that reason might be regarded under some circumstances as having been withdrawn from the jury's consideration as a basis for finding damages for negligence, it is evident that such was not the effect on the trial below. But the case having to go back, it is proper to say that the amended petition tendered by the plaintiff at the appearance term of the case, setting up these additional grounds of complaint as matters of negligence, should be permitted to be filed. The cause of action is not changed. The alleged acts of negligence all may have concurred to cause the injury. It was error to the plaintiff's prejudice to refuse to allow it to be filed, but the court having rejected it, the defendant was under no legal requirement to meet it by counter-proof, and may not have been prepared to try the case on issues not presented by the pleading.

In the case of *Cincinnati etc. R. R. Co. v. Barker*, 94 Ky. 71, decided at this term, where the subject matter of the negligence charged was the setting fire to a depot, it was held that the construction and ¹⁷⁶ combustibility of the structure alleged to have been fired were necessarily and naturally proper subjects of inquiry and of instruction. In this case the act of driving the car over the plaintiff involved only the operation and management of the train, and was in no way connected with the unsafe condition of the guardrail, or the crookedness of the coupling-pin. It is insisted by the company that it was error to its prejudice to permit the witness, Blandford, a life insurance agent, to read as evidence to the jury the American Life Table, showing the expectancy of a man of plaintiff's age. On this there appears to be no direct authority or precedent in this state. The cases in which such testimony has been offered and approved have been those in which loss of life has occurred.

In Thompson's Carriers of Passengers, 565, it is said: "It is also competent for the plaintiff to show that the injuries complained of are permanent in their nature; that he will probably not recover from their effects; and, when there is such testimony, it is not improper to introduce in evidence standard life tables to show the expectancy of life of one of the age of the injured party, as a basis upon which to estimate the amount of damages he should recover."

It is said "that in actions for personal injuries occasioned by the negligence of the defendant, on the question of damages, it is not only proper but important for the plaintiff to show by the evidence his previous physical condition and ability to labor or follow his usual avocation, as well as his condition since the injury, to enable the jury to properly find the pecuniary ¹⁷⁷ damage": *City of Joliet v. Conway*, 119 Ill. 489. And if so, and we think the doctrine appears reasonable, there would seem to be no reason why, as the ability to labor and the earning capacity of the injured party may be inquired into, the duration of that capacity and ability to labor may not be ascertained by the usual mode of computing the probable length of life. But the proof must be taken subject to the conditions surrounding the particular individual under investigation. Hence, the existence of disease tending to shorten life may be shown, and it must also be borne in mind that mere probable continuance of life is shown by such tables, not the duration of ability to work or to earn money in old age: 2 Sedgwick on Damages, sec. 581. And when we add to these complications that a proper discrimination must be made between the lessening of earning capacity by reason of the loss of a finger, and that occasioned by the loss of a leg, we confess the introduction of such testimony will hardly tend to enlighten the jury to any great extent. We cannot say, however, that such proof is incompetent. On the whole, it would seem better, if the jury are to find for the plaintiff in a given case, that they should be instructed in estimating the amount of the damages, to take into consideration the age and situation of the plaintiff, his earning capacity, and its probable duration, his bodily suffering, and mental anguish resulting from the injury received, and the loss sustained by the want of the limb injured, and the extent to which he is disabled from making a support for himself by reason of the injury received: *Whalen v. St. Louis etc. Ry. Co.*, 60 Mo. 324.

¹⁷⁸ By instruction "I," given at the company's instance, and properly, the jury were told not to find for plaintiff, unless they believed from the evidence "that those superior in authority to plaintiff in operating the train, with gross negligence ran said train or car wheels over plaintiff's ankle and crushed it."

But in No. 1, given by the court over the defendant's objection, they are told that, if the preponderance of the evi-

dence shows that the defendant's employees, in operating their train, or failing to control its movements properly, were guilty of ordinary, gross, or willful neglect, by which plaintiff was injured, etc., the law was for the plaintiff.

This instruction is erroneous in two respects. The employees must have been those who were superior to plaintiff in point of authority and control, and the negligence must have been gross.

In the leading case of *Louisville etc. R. R. Co. v. Collins*, 2 Duval, 114, 87 Am. Dec. 486, and which has been followed invariably since in this court, Judge Robertson said: "It" (the company) "is therefore responsible for the negligence or unskillfulness of its engineer, as its controlling agent in the management of its locomotives and running cars, and that responsibility is graduated by the classes of persons injured by the engineer's neglect or want of skill—as to strangers, ordinary negligence is sufficient—as to subordinate employees associated with the engineer in conducting the cars, the negligence must be gross, but as to employees in a different department of service, unconnected with the running operations, ordinary negligence may be sufficient"; and it may be here added ¹⁷⁹ that a fireman, when acting as an engineer, is, of course, an employee superior to the brakeman: *Louisville etc. R. R. Co. v. Moore*, 83 Ky. 675.

At the defendant's instance, and over the plaintiff's objection, the jury, by instruction "A," were told that, if the risk and danger of going between the cars was apparent, open, and visible to plaintiff when he went in to do the uncoupling of the cars, the jury should find for the defendant. This is misleading and erroneous. The brakeman may, indeed must, take the ordinary risk of going between cars when in motion, as the practice is shown to exist by common acquiescence, if not at the express direction of the companies, and such risk is necessarily open and visible; but it by no means follows that the conductor and engineer may desert him in his hour of peril, and the company be relieved of the consequences of the gross negligence of these officials, if guilty of such negligence, although the danger and risk imposed on the inferior employee be open and visible.

The errors considered on the two appeals appearing to have been to the prejudice of both plaintiff and defendant this seems to be a proper case for a division of the costs of the appeals, and such may be made.

Let the judgment be reversed, and cause remanded, with directions to proceed as herein indicated.

PERSONS MANAGING RAILROADS MUST EXERCISE THE STRICTEST VIGILANCE, and are answerable for every injury caused by defects in roads, cars, or engines, or by any negligence, however slight, of the company or its agents: *Pennsylvania R. R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323, and note; *Knight v. Portland etc. R. R. Co.*, 56 Me. 234; 96 Am. Dec. 449, and note.

MASTER AND SERVANT—NEGLIGENCE—DAMAGES—EVIDENCE.—A general allegation of damages lets in evidence of such damages only as naturally or necessarily resulted from the wrongs charged: *Campbell v. Cook*, 86 Tex. 630; 40 Am. St. Rep. 878.

DAMAGES—NEGLIGENCE—EVIDENCE.—The Carlisle tables of mortality are admissible in evidence in an action for damages for negligence, when, and for what purpose: *Steindrunner v. Pittsburgh etc. Ry. Co.*, 146 Pa. St. 504; 28 Am. St. Rep. 806, and note, showing upon what the value of life tables as evidence depends. They are not conclusive: See note to *Adams v. Iron Cliffs Co.*, 18 Am. St. Rep. 458.

DAMAGES.—ELEMENTS OF, IN ACTION FOR PERSONAL INJURY: See *Standard Oil Co. v. Tierney*, 92 Ky. 367; 36 Am. St. Rep. 595, and note; *McHugh v. Schlosser*, 159 Pa. St. 480; 39 Am. St. Rep. 699, and note.

MASTER AND SERVANT.—THE LIABILITY OF A MASTER FOR THE NEGLIGENCE OF HIS SERVANT, whereby another servant is injured, does not depend upon the doctrine of *respondet superior*, but upon the omission of some duty of the master which is deputed to such inferior employee. If the act omitted is one of the kind which the master owes to his employee the duty of performing, he is responsible to the employee for the manner of its performance. It is not a question of rank among the different employees: *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416; 40 Am. St. Rep. 616, and note; *Dwyer v. American Ex. Co.*, 82 Wis. 307; 33 Am. St. Rep. 44, and note.

MASTER AND SERVANT.—A MASTER IS NOT RESPONSIBLE FOR THE NEGLIGENCE OF HIS SUPERIOR SERVANT in giving orders whereby injury is sustained by an inferior servant: *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70; 38 Am. St. Rep. 396.

MASTER AND SERVANT.—FELLOW-SERVANTS, WHO ARE: See *Jenkins v. Richmond etc. R. R. Co.*, 39 S. C. 507; 39 Am. St. Rep. 750; *Georgia Pac. Ry. Co. v. Davis*, 92 Ala. 300; 25 Am. St. Rep. 47.

RAILROAD COMPANIES.—CARE REQUIRED OF SERVANT IN COUPLING OR UNCOUPLING CARS: See *Ragon v. Toledo etc. R. R. Co.*, 97 Mich. 265; 37 Am. St. Rep. 336, and note, showing want of precaution that will preclude recovery.

MARTIN v. RICHARDSON.

[94 KENTUCKY, 188.]

CONTRACTS GROWING OUT OF ILLEGAL TRANSACTIONS—LOTTERY TICKET.

One who purchases a lottery ticket in violation of law may recover the proceeds of a prize drawn by it from one who has collected such proceeds after having fraudulently obtained the ticket from such purchaser in exchange for another worthless lottery ticket after the former has drawn the prize.

LOTTERY TICKETS—RIGHT TO RECOVER.—The lawful owner of a legal lottery ticket which has drawn a prize may recover the amount thereof from one who has fraudulently obtained the ticket from him after the drawing, and has collected the amount of the prize. In such case every presumption is indulged in favor of the legality of the ticket and of its purchase, in the absence of allegation and proof to the contrary.

CONTRACTS—VALIDITY OF WHEN SPRINGING FROM ILLEGAL TRANSACTIONS.

If an act in violation of law is already committed, a subsequent agreement, which, though founded thereon, constitutes no part of the original inducement or consideration for the illegal act, is valid.

Adair & Morton, for the appellant.

W. Lindsay, E. W. Hines, and Allen & Hughes, for the appellee.

¹⁸⁵ HAZELRIGG, J. Richardson, the appellee, was the owner and holder, by purchase from Martin, the appellant, of four tickets in the Little Louisiana Lottery concern. Among them was ticket No. 93,262.

The drawing was fixed for January 14, 1890, and, on the 15th or 16th of that month. Martin informed Richardson that it had been postponed. He then induced him to surrender his four tickets and accept one in the Big Louisiana Lottery, saying that he had let him have these four tickets by mistake, that they belonged to another person, who was demanding them. As a matter of fact the drawing had not been postponed, and the ticket numbered as above stated had drawn a prize of three thousand seven hundred and fifty dollars. These facts were known to the appellant and not to the appellee. Thereafter the appellant ¹⁸⁶ presented the ticket to the lottery concern and received the prize. Refusing to account to the appellee for it, he was sued, and in the lower court, after the verdict of a jury, judgment for the sum of three thousand seven hundred and fifty dollars was rendered against him, and from which he appeals. He does not bring up the evidence, and hence the only question is as to the sufficiency of the pleadings to support the verdict and

judgment. The action was simply one for money had and received. The defendant collected that which belonged to the plaintiff, and the law implied a contract to pay it over to him. The contract which the law raised between them was not founded on the purchase or sale of a lottery ticket, but on the obligation to refund the money which had been procured and received by falsehood and fraud. It is true the plaintiff alleges that he bought the ticket from the defendant, and that it was one in the Little Louisiana Lottery, but he does not state where he bought it, and there is nothing in the petition to show that the lottery was unauthorized by law to transact such business. Hence the demurrer was properly overruled.

The answer denied that the plaintiff had ever owned or held the ticket numbered 93,262, or that the defendant ever delivered said ticket to the plaintiff, or that such ticket was obtained by defendant from the plaintiff in any way, or that he made the representations complained of.

Then follows a statement in the answer of how the plaintiff and defendant had exchanged a dollar ticket in the Big Louisiana Lottery for four twenty-five cent ¹⁸⁷ tickets in the Little Louisiana Lottery, and he disclaims any knowledge at the time of any of the tickets having drawn prizes. He avers that the Little Louisiana Lottery is located and operated in California, and is not licensed or authorized by the laws of California or other states to carry on that business; nor is either of said concerns authorized or licensed to carry on such business, or sell or dispose of tickets or prizes by any law or statute of this state; that both plaintiff and defendant resided in this state at the time of the purchase by plaintiff of the tickets, and at the time of their procurement and exchange as aforesaid, and all said acts and transactions were had and done in Union county, Kentucky.

It will be observed that it is nowhere alleged that plaintiff bought ticket No. 93,262 in Kentucky, or that he exchanged that particular ticket with the defendant in Kentucky. The transactions set up by the defendant in his answer as having occurred in Union county, Kentucky, necessarily excluded those with reference to this particular ticket, because the defendant expressly and unreservedly denied that plaintiff ever held this ticket, or that he ever obtained it from him in any way. Moreover, the plaintiff, by reply, denied that the Little Louisiana Lottery was not licensed or authorized by

law to carry on such business; and therefore, as every presumption must be indulged in necessary to support the judgment, we must assume, in the absence of any thing to the contrary, that this purchase or exchange of ticket No. 93,262 occurred in some place where it was legal and lawful to purchase it or exchange it, and that the Little Louisiana Lottery ¹⁸⁸ was an institution legally licensed to carry on its business. If the evidence were before us a different state of case might be shown, but the verdict was for the plaintiff, and presumably sustained by the proof. And moreover, as announced in all such cases, every presumption is in favor of the legality of the transaction: *Bibb v. Miller*, 11 Bush, 306. Here, then, we have a case where a party holds a ticket, the value of which does not depend on any chance, or its payment on the voluntary action of the company, and the legal attention, title, and ownership of which is not called in question or tainted with any sort of illegality. It is fraudulently obtained from the possession of its rightful owner, and we can see no reason why recovery may not be had. Such, indeed, would seem to be the case if the purchase or sale were shown to have occurred in Kentucky. This is not an action on a contract of sale or purchase of a lottery ticket. The transaction out of which the suit springs, and which forms its sole basis, is subsequent to any alleged illegal act, and wholly disconnected with it.

In *Armstrong v. Toler*, 11 Wheat. 258, Chief Justice Marshall approved the opinion of the lower court, which was to the effect "that a new contract, founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful." And Toler was allowed to recover of Armstrong money which he had paid for Armstrong on account of goods known by both parties to have been imported contrary to law.

¹⁸⁹ In *Catts v. Phalen*, 2 How. 376, Catts was employed to draw out the tickets. He had a confederate to buy a certain ticket, and before inserting his hand in the lottery wheel he concealed in the cuff of his coat certain false and fraudulent tickets, which he managed to slip between his fingers, and then drawing out his hand produced the false ticket. When sued for the money received on the tickets so procured he relied on the admitted illegality of the lottery drawing.

The supreme court said: "Phalen & Morris had in their possession twelve thousand five hundred dollars, either in

their own right or as trustees for others interested in the lottery. No matter which, the legal right to this sum was in them. The defendant claimed and received it, by false and fraudulent pretenses, as morally criminal as by larceny, forgery, or perjury; and the only question before us is whether he can retain it by any principle or rule of law."

"To state," says the court, "is to decide such a case."

"The principle of illegal contracts is" (see Story on Conflict of Laws, secs. 248, 249), "after the illegal act is done, if the new contract is wholly unconnected with the illegal act, and is founded on a new consideration, and is not a part of the original scheme, although it may be known to the party with whom the contract is made, it will make no difference that such new and independent contracts are made with the person who is the contractor or conductor of the original illegal act, if it is wholly disconnected therefrom."

So in Story on Contracts, section 760, it is said: ¹⁰⁰ "If an act in violation of either statute or common law be already committed, and a subsequent agreement entered into, which, though founded thereupon, constituted no part of the original inducement or consideration of the illegal act, such an agreement is valid."

Instead of an "agreement" between the parties, founded upon alleged illegal acts, we have in this case an implied obligation raised by law to refund moneys fraudulently received and withheld. For other authorities to the same effect, see *Farmer v. Russell*, 1 Bos. & P. 295; *Willson v Owen*, 30 Mich. 474; *Rothrock v Perkinson*, 61 Ind. 39.

The Little Louisiana Lottery concern was, under the pleadings in this case, an institution operated under lawful authority, and the defendant, in presenting the ticket in question, and in collecting the plaintiff's money, may be regarded as acting as his agent, and as collecting for his use. The law implies an obligation to refund the money, which is subsequent to and disconnected with the alleged illegal acts of buying, selling, or exchanging the tickets.

Judgment affirmed.

CONTRACTS GROWING OUT OF ILLEGAL TRANSACTIONS — ACTIONS ON. — No rights can spring out of or be rested upon an act in the performance of which a criminal penalty is incurred, and all contracts which are made in violation of a penal statute are void: *Youngblood v. Birmingham Trust etc. Co.*, 95 Ala. 521; 36 Am. St. Rep. 245, and note, with the cases collected.

ROBERTS v. YANCEY.

[94 KENTUCKY, 242.]

CHAMPERTY.—AN ASSIGNMENT OF A NOTE to an attorney, in consideration of his agreement to bring suit thereon at his own costs and expense, and divide with the assignor whatever sum he collects, is champertous and void.

CHAMPERTY—CONSTRUCTION OF STATUTE.—Under a statute providing that all contracts made in consideration of services to be rendered in the prosecution or defense, in or out of court, of any suit by any person not a party on record in such suit, whereby any part of the thing sued for is to be received by such person for his services or assistance, shall be void, it is not necessary that an action should be pending to render the contract champertous and void.

TRUSTEES AND BENEFICIARIES—ACTIONS AGAINST—NECESSARY PARTIES.—A trustee and his *cestui que trust* are so far independent of each other that an action against one has no effect upon the other, and both are essential parties to a complete determination of any action in reference to the trust estate.

TRUSTEES AND BENEFICIARIES—JUDGMENTS AGAINST.—A judgment against a *cestui que trust*, the trustee not being a party, does not bind him, and he, in an action, that seeks to subject the trust estate to the satisfaction of that judgment, may contest its correctness, and show that it is void.

Lindsay & Bolts, for the appellant.

E. E. Settle, for the appellees.

244 BENNETT, C. J. R. S. Yancey executed and delivered to Jesse Holbrook his promissory note. Thereafter, Holbrook assigned said note to W. B. Roberts, a lawyer, and appellant. The consideration of the assignment was that the appellant, as such assignee, was to bring suit on said note against R. S. Yancey at his own costs and expense, and divide whatever sum that he might collect from said Yancey between himself and Holbrook. Judgment was obtained by default against Yancey for the amount of said note, and execution having issued thereon and returned no property found, the appellant instituted this equitable action against the said appellant, and R. H. Yancey, his trustee, to subject the trust estate held by R. H. Yancey, to said debt. R. H. Yancey, who was not a party to the common-law suit, by an amended answer contested the right of the appellant to subject said trust estate to said debt, upon the ground that, the contract being champertous and void, the judgment rendered thereon is void. The lower court overruled a demurrer to the 245 amended petition, and from this action the appellant ap-

pealed to the superior court, and that court affirmed the judgment; and from that opinion this appeal is prosecuted.

The appellee contends, first, that the law of champerty does not apply to this case, because it is not alleged that suit was pending at the time the contract was made with a person not a party on record.

Section 1 of chapter 11 of the General Statutes provides: "All contracts, agreements, and conveyances made in consideration of the services to be rendered in the prosecution or defense, or the aiding in the prosecution or defense in or out of court, of any suit by any person not a party on record in such suit, whereby the thing sued for or in controversy, or any part thereof, is to be taken, paid, or received by such person for his services or assistance, shall be null and void."

"SEC. 8. Neither party to any contract made in violation of the provisions of this chapter shall have any right of action or suit thereon."

As to the first contention of the appellant, it is sufficient to say that it is not necessary that an action should be pending in order to create a champertous contract within the meaning of said section: See *Rust v. Larue*, 4 Litt. 418; 14 Am. Dec. 172; 3 Am. & Eng. Ency. of Law, 70. Also the section quoted does not mean that an action must be pending in order to make the contract champertous.

The eighth section quoted expressly provides that neither party to such contract shall have any right of action or suit thereon. Said section makes it clear, ²⁴⁶ if there was otherwise any doubt, that no action or suit shall be brought on such contract, evidently because the contract, being vicious and against public policy, tainted the whole transaction, and, consequently, any judgment rendered thereon, the object of which is to enforce said contract, may be resisted by the proper parties. Therefore, there is no doubt that any person not a party or privy to said common-law judgment is not bound thereby; and, whenever an attempt to enforce it antagonizes his rights or duties, he may resist said judgment to the extent that its enforcement antagonizes his rights, and in order to do so he may show that said judgment is void on account of champerty, etc.

The trustee held some estate willed to him by his father in trust for his brother, R. S. Yancey, and he was intrusted with the control and management of the same for the use of his said brother during his life, and then to his children.

This trust does not make him his brother's privy. His control and management of the estate is absolute, being only subject to an action for damages if he abuses his trust.

He, as trustee, and his brother as *cestui que trust*, as a general rule, are regarded as being so independent that proceedings against one have no effect upon the other, and both are essential to a complete determination of any action in reference to the trust estate: See Freeman on Judgments, sec. 173. That is, to say, as a general rule, a common-law judgment against the *cestui que trust*, the trustee not being a party, does not bind him, and he, in an action that seeks to ²⁴⁷ subject the trust estate to satisfaction of that judgment, may contest the correctness of the judgment, and show that it is void, in order to protect the trust property.

The judgment is affirmed.

CHAMPERTY.—A contract whereby one person agrees to prosecute an action on behalf of others, for a share of the proceeds of such action, is not void for champerty, when it is not against public policy: *Metropolitan etc. Ins. Co. v. Fuller*, 61 Conn. 252; 29 Am. St. Rep. 196. A *bona fide* agreement by a layman to furnish funds to carry on a pending litigation, in consideration of having a share in the property in dispute if recovered, is not *per se* void, either on the ground of champerty or of public policy: *Brown v. Bigné*, 21 Or. 260; 28 Am. St. Rep. 752, and note. An agreement is not champertous, by which an attorney was to receive a certain per cent of the amount recovered for his services and expenses in the prosecution of a claim for the destruction of property by a Confederate cruiser, before the court of commissioners of Alabama claims, the proceedings before such tribunal being an inquest and a trial: *Manning v. Sprague*, 148 Mass. 18; 12 Am. St. Rep. 508, and note. See, also, the extended note to *Thallimer v. Brinckerhoff*, 15 Am. Dec. 316.

TRUSTS—PARTIES TO ACTION AGAINST TRUST ESTATE.—*Cestuis que trust* need not be joined in an action by a creditor, to reach trust property in the hands of administrators, or trustees who have the control of, and whose duty it is to protect, the property: *Winslow v. Minnesota etc. R. R. Co.*, 4 Minn. 313; 77 Am. Dec. 519. This question is discussed in the monographic note to *Collins v. Loftus*, 34 Am. Dec. 722.

DAVIS v. JONES.

[94 KENTUCKY, 320.]

CONTRACT BY ONE PERSON TO MAKE ANOTHER HIS LEGAL HEIR, not in accordance with statute, is not enforceable, and no action lies for its breach.

W. H. Holt and A. K. Cook, for the appellant.

320 BENNETT, C. J. The appellants allege in their petition that George Jones agreed with the mother of the appellant, Marinda Davis, that, in consideration of the mother surrendering the custody, care, and control of Marinda, then an infant, to him, "he would clothe, support, and educate her, and make her his heir at law, so that she could inherit all his estate." The appellants say that said Jones died without making Marinda his heir at law. They claim five thousand dollars damage for such failure. The court sustained a demurrer to the petition, and the appellants have appealed. Was the agreement to make appellant Marinda the heir of George Jones binding upon him? Such agreements are against the policy of the common law; hence unauthorized, because heirship is controlled 321 by the law of descents, having for its basis the degrees in blood, etc. And such agreements as that sued on in this case would put the estate in a different channel from that fixed by the law of descents.

Such contracts being unauthorized by the common law, and as all common contracts in this state are generally either authorized by the common law or by statute, no contract in general is binding unless it is authorized by the common law or by statute; and as the same reason exists in this state for forbidding such contracts as exists at common law, they are unauthorized and not binding. But the legislature of this state has seen proper to authorize certain parties to make persons not related to them their legal heirs upon certain conditions, by petition to the county court having jurisdiction. And it has been settled by this court that the authority thus given is the only authority existing in this state by which one person can make another his legal heir, and any agreement by one person to make another his legal heir, not in accordance with said statute, is not enforceable (see *Willoughby v. Motley*, 83 Ky. 300; *Power v. Hafley*, 85 Ky. 671); and no action will lie for its breach. In the case of *Allen v. Thomas*, 3 Met. (Ky.) 198, 77 Am. Dec. 169, the father of a

bastard child agreed with its mother, she being about to sue him, to contribute to the support of the mother and child, and pay to the child ten thousand dollars when requested. It was held that the agreement was binding because it was based upon a compromise and adjustment of a claim that the mother had a right to make in behalf of herself and child. There is no ³²³ principle of public policy or of statute forbidding a compromise of such claim.

In this case, the agreement not being in accordance with the statute, *supra*, is not enforceable, and no action will lie for its breach.

The judgment is affirmed.

CONTRACTS TO MAKE A WILL—VALIDITY OF.—A contract to make a will may be enforced: *Huguley v. Lanier*, 86 Ga. 636; 22 Am. St. Rep. 487, and note; *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46, and note. A person may make a valid agreement to make a particular disposition of his property by will: *Carmichael v. Carmichael*, 72 Mich. 76; 16 Am. St. Rep. 528, and note. See the extended notes to *Johnson v. Hubbell*, 66 Am. Dec. 784, and *Hawkins v. Ball*, 68 Am. Dec. 759.

BRECKENRIDGE COMPANY v. HICKS.

[94 KENTUCKY, 362.]

MASTER AND SERVANT—DEFECTIVE APPLIANCES—FAILURE OF MASTER TO KEEP PROMISE TO REPAIR.—When a master or superior servant notified by an inferior servant of a defect in the machinery, appliances, or premises furnished for his use, promises to repair within a reasonable time, such servant, by remaining in the service a reasonable time thereafter, does not assume the risk, nor waive his right to recover from the master, if injured by reason of the defect within such time.

MASTER AND SERVANT—DEFECTIVE APPLIANCES—RISK ASSUMED BY SERVANT.—If a servant knowing of a defect in machinery, materials, or premises furnished for his use, without complaint or promise from the master or superior servant to repair, continues to use them, he assumes the risk and waives all claim against the master for injury therefrom.

Bullitt & Sheild, for the appellant.

Farleigh & Straus and D. R. Murray, for the appellee.

³⁶³ PRYOR, J. The appellee, Hicks, in working the mines of the appellant, received a serious personal injury by the falling of a stone upon him from the roof of the quarry or mine while in the employ of the company, ³⁶⁴ and has recovered four thousand dollars in damages on the ground that

the injury resulted from the negligence of the company's employees.

In order for the protection of miners, and to prevent such injuries from falling stones, the roof above the miner is supported by props that are furnished by the company, and, where the distance under the mines from the entry is considerable, these props are hauled in by cars that are used in bringing out the coal. Sometimes the miners themselves carry the props on their shoulders to the places wanted, but the evidence in this case conduces to show, and without contradiction, that it is the duty of the company to furnish them at the place designated or deemed necessary for their use. The appellee and his fellow-laborers were experienced miners, and, apprehending danger, or thinking there was a necessity for props where they were at work, had laid out timbers, such as they wanted to use for props, and marked them so as those whose duty it was to bring them in would have no difficulty in getting such props as they wished.

The haulers, as they are termed, were told several times to bring them in, but failed. The mining boss had been in the room where this appellee was at work two days before the accident, and his judgment consulted as to the danger. He was shown some loose stone in the roof, over the road, and wanted the workmen to brace it, and was told it would cost no more to take it down; Hicks, appellee, remarking that they could not get timbers to brace their room up, or roof above, much less the roadway. The boss then promised to send timbers ²⁶⁵ in. The very day of the accident, the employees or haulers were told to bring the timbers in by Hicks, and Dickerson, who was at work with Hicks, says they were told every day. This boss was told a day or two before the injury that the props ought to be sent in, and his reply was, "Damn it, I forgot it."

Hicks and Dickerson were the only ones working in the room at the time of the injury, and, finding that no props would be sent in, resolved to quit work, and, in leaving, Hicks having gone into one corner of the room for oil to fill his lamp, in returning this rock fell upon him, crippling him for life. Dickerson says it was not the rock above their heads where they had been digging, and if the testimony of these witnesses is to be credited, it is evident that the personal injury resulted from the neglect of the defendant's employees.

We have given the testimony for the appellee bearing on

the main question, all of which is, in effect, controverted by the testimony for the appellant, and the sole question in this case is, Should the court have instructed the jury to find for the defendant? A peremptory instruction was based on the idea that this appellee, knowing the danger, voluntarily continued his work, in a place where he knew, or must be presumed to have known, that he was in danger of great bodily injury. The cases of *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81, and *Bogenschutz v. Smith*, 84 Ky. 330, as well as other similar cases, are relied on as sustaining this doctrine. The doctrine contended for is well understood, and, if the testimony for the appellee brings ³⁶⁶ this case within the rule, then the verdict below should have been for the defendant.

In *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81, there were two planks placed side by side from a barge filled with stone to a crib into which the stone was being placed. The workman used the plank in carrying the stone for days, making no complaint, and finally fell off the plank and was drowned. He knew the danger, saw what he had to stand on, made no complaint, and after his death it was insisted that proper protection to his person had not been afforded by his employer. This court said he voluntarily placed himself in the position from which he fell, knew the danger, and by the exercise of proper care might have avoided it. The same question arose in *Bogenschutz v. Smith*, 84 Ky. 330, and in *Hughes v. Cincinnati etc. R. R. Co.*, 91 Ky. 526. It will be assumed in this case that both the employer and employee knew of the danger, or from the facts had the right to apprehend it. Then the question arises, Did Hicks waive the danger, and voluntarily assume to work without looking to the employer for these props? If Hicks, knowing the danger, continued in his work without complaint, or rather without requiring of his superior to provide these props, then he cannot recover, and this is the rule recognized by the cases to which our attention has been called by counsel for the appellant. Suppose, however, the superior is notified of the danger, and the necessity for these props, and promises to furnish them in a reasonable time, then the workman may continue his work, and will not be adjudged to have waived the right of ³⁶⁷ exacting this duty of his superior by remaining this reasonable time in the service.

This is the doctrine of all the text-books with reference to machinery, and the appliances to be used by the laborer in

the discharge of his duties: Beach on Contributory Negligence, 372. This court said in *Bogenschutz v. Smith*, 84 Ky. 340: "But generally, if a servant knows that the machinery or material furnished him for work is defective and unsafe, or that the premises where he labors are dangerous, and he, without complaint or promise from the master of a change, continues to use them, he must be deemed to have waived any claim against the master for injury therefrom." The ordinary risks and danger in this kind of labor the appellee assumed when he undertook the work, and while this danger may be anticipated either with or without supporting the roof above, where the laborer continues to discharge his duties for a few days, believing, and having the right to believe, that the support required will be furnished him, there seems to us to be no valid reason for determining that such conduct is a waiver of the right of recovery, when, if the superior had complied with his promise, no injury would have been inflicted. The course pursued by the appellee was rational, and, under the belief that all danger would be averted by a compliance by the boss with his promise, and when he saw that danger was actually impending was leaving to avoid it when the stone fell. The right of recovery exists if the testimony of the appellee and his co-workman is to prevail.

Judgment affirmed. —

MASTER AND SERVANT—DEFECTIVE APPLIANCES—ASSUMPTION OF RISK. A servant assumes the ordinary risk of his employment, but not if he is ignorant of the danger, and has no reasonable opportunity to know it: See note to *Orman v. Mannix*, 31 Am. St. Rep. 349. If machinery with which a servant works is out of repair, and in a dangerous condition for more than two weeks, the master must be chargeable with negligence if the supervision exercised by him, or his agents, has been such that he does not know of the condition of such machinery: *Monmouth Mining etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187. To enable an employee to recover from his employer on account of injuries received by reason of defective places, machinery, appliances, or incompetent co-employees, it is generally necessary to allege and prove that the employer was in fault, and that the employee was without fault, or to allege and prove facts from which such fault and want of fault may be inferred: *Pennsylvania Co. v. Congdon*, 134 Ind. 226; 39 Am. St. Rep. 251, and note.

MASTER AND SERVANT—NOTICE AS TO DEFECTIVE MACHINERY—ASSUMPTION OF RISK—FELLOW-SERVANTS.—It is the servant's duty to observe whether machinery furnished him is in repair, and to report to the master if it is not. If he does not do this he continues to work at his own risk. A servant does not assume the risk of the negligence of a fellow-servant in using defective machinery. A master is bound to exercise reasonable care

and diligence in providing and keeping in repair safe tools and machinery for his servant's use. A servant, therefore, has the right to presume that such tools and machinery are safe, and that they will be kept in repair: *Mosmouth Mining etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187, and note; *Orman v. Mannix*, 17 Col. 564; 31 Am. St. Rep. 340, and note; *Ragon v. Toledo etc. R. R. Co.*, 97 Mich. 265; 37 Am. St. Rep. 336, and note.

HAZELETT v. FARTHING.

[94 KENTUCKY, 421.]

WILLS—CONSTRUCTION OF DEVISE TO WIFE AND CHILDREN.—A devise by a testator "to my beloved wife and children," naming them, gives to the persons named a joint and equal interest in the property devised, and not a life interest to the wife, with remainder to the children.

WILLS, HOMESTEAD RIGHTS UNDER.—A widow who accepts the provisions of the will of her deceased husband disposing of his homestead cannot claim a homestead in the land, and in such case the claim of their children to a homestead is also barred.

WILLS—HOMESTEAD RIGHTS.—A husband may dispose of his homestead by will in any manner he may choose, subject only to right of his widow to renounce the will and claim under the statute.

WILLS—RIGHT OF DISINHERITED CHILD INHERITING FROM DEVISEE.—A child of a testator, excluded from inheriting under the terms of his will, having inherited an interest in the property devised, by the death of one of the devisees, is entitled to have the property divided, and her interest allotted to her, or, if the property is not susceptible of division, then to have it sold, and her share of the proceeds of the sale allotted to her.

R. S. Dinkle, for the appellants.

422 LEWIS, J. The land in question is included by the fourth clause of the will of George Farthing: "I will and devise to my beloved wife and children, namely: Susan Francis Farthing, Charles W. Farthing, H. M. Pulliam, N. J. Farthing, C. B. Farthing, and J. C. Farthing, all the balance of my personal property and real estate, of whatever kind, and I hereby declare this writing to be my only and last will and testament."

It is plain the testator intended to give to his wife not a life estate, remainder to the others named in that clause, but a joint and equal interest in the fifty-two acres with them; for one of his children, plaintiff and appellant, Mary E. Hazelett, was purposely excluded from any interest, while one of those, named H. M. Pulliam, was not his child, but a stepson, he having been twice married, and having at his death two sets of children.

It is alleged in the petition of plaintiff that the widow, who is her stepmother, accepted provisions of her husband's will, and has, together with infant children, occupied the land under it for twelve years ⁴²³ past. The relief prayed for is sale of the land and division of the proceeds, a portion of which plaintiff claims in right of her full brother, one of the persons named in the fourth clause, but since deceased.

Section 14, article 13, chapter 38, of the General Statutes, it seems to us, was intended to apply in case of the husband dying intestate, when, as thereby provided, "the homestead shall be for the use of the widow so long as she occupies the same, and the unmarried infant children of the husband shall be entitled to a joint occupancy with her until the unmarried infant child arrives at full age."

It is true the widow may, by renouncing the will—not, however, done in this case—claim and have benefit of a homestead or dower right in land, but not both. But a person was not intended, by what is called the homestead law, to be precluded from disposing of his homestead by will in any manner he might choose, though of course subject to right of his wife to renounce the will, and claim under the statute.

In our opinion the case of *Elmore v. Elmore*, 5 Ky. Law Rep. 580, is conclusive of the right of both the widow and children of the testator, George Farthing. It was there held that the widow having accepted the provisions of the will, she had no right of homestead, and, if she has none, the children in such state of case have none. The latter part of section 14 provides: "But the termination of the widow's occupancy shall not affect the right of the children; but said land may be sold subject to the right of said widow and children, if a sale is necessary to pay debts of the husband."

⁴²⁴ It has accordingly been held by this court that the widow could not, by terminating her occupancy, nor otherwise, deprive the infant children of their homestead right. But such rule applies only in cases where the widow and children become entitled to a homestead by operation of law, not where the husband and father has otherwise disposed of his land by will. Neither the widow or infant children had, when this action was commenced, a homestead right to the land of testator, George Farthing, but appellant was entitled to have the land sold, not being susceptible of division, and the share of proceeds of sale she inherited from her deceased brother allotted to her.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

WILLS.—DEVISE TO WIFE AND CHILDREN, CONSTRUCTION OF: See *Weaver v. Weaver*, 92 Ky. 491; 36 Am. St. Rep. 604, and note.

WILLS.—ELECTION OF WIDOW NOT TO TAKE UNDER A WILL: See note to *Estate of Vance*, 23 Am. St. Rep. 273; *Estate of Cunningham*, 137 Pa. St. 621; 21 Am. St. Rep. 901.

HOMESTEAD—RIGHT OF WIDOW UNDER WILL.—A husband and father cannot, by will, deprive his widow and minor children of their homestead right, but the provisions of his will may be so clearly expressed to be in lien of homestead, that his widow may be compelled to choose which she will take, and, by electing to take the former, renounce the latter: *Hatch's Estate*, 62 Vt. 300; 22 Am. St. Rep. 109. This case also shows when dower is barred by the provisions of a will.

PHILLIPS v. THOMAS LUMBER COMPANY.

[94 KENTUCKY, 445.]

DEED OR WILL—CONSTRUCTION OF WRITING—INTENTION.—Whether an instrument in writing is a deed or a will depends upon the intention of the maker as gathered from the entire language used in the instrument.

DEED TO TAKE EFFECT ON GRANTOR'S DEATH.—An instrument in writing by which the maker deeds specific land to his wife for life, remainder to his grandson, and recites that "this deed is not to take effect" until the grantor's death, he "to have and keep full possession of said farm during his life," is a deed, taking effect upon execution and delivery, and vesting a remainder in the grandson immediately, reserving to the grantor a life estate only, and if the latter, after the deed is recorded, sells and conveys valuable timber standing on the land, the purchaser from him, after his death, is not entitled to enter for the purpose of taking such timber.

R. T. Burns and Stewart & Stewart, for the appellant.

L. T. Moore and John F. Hager, for the appellee.

446 **PRYOR, J.** Jesse Phillips, in consideration of the kind treatment of his wife Vicey, and the love and affection he had for his grandson, John Phillips, as he expresses it, granted and conveyed to them his lands upon which he lived, describing them by a specific boundary, in the following manner: "This land is deeded to Vicey E. Phillips during her life, and she is to live on and have control until her death, and at the time of her death it is to go to and belong to John Phillips, son of William Phillips, deceased, and his heirs forever. This deed is not to take effect until the death of Jesse Phillips, and Jesse Phillips is to have and keep full possession

of said farm during his life, and to have all proceeds of said farm until his death; and if said John should get in debt, or any thing that would sell the land, then at the time of sale it is to go to his children," etc.

The deed was lodged for record and recorded in the county of the grantor's residence, and where the land is located, and the grantor lived upon it until his death, that occurred not long before this action was instituted.

After this conveyance to his wife and grandson the grantor sold and conveyed to the appellee, the Thomas Lumber Company, all the valuable timber standing upon this land, the consideration paid being some twenty-three hundred dollars. This deed was also admitted to record.

After the death of the grantor the appellee claimed the right to use and occupy this land for the purpose of getting the timber from it, and asserting its right ⁴⁴⁷ to the timber by reason of this conveyance made subsequent to that made to the appellant.

The appellant filed this petition, claiming the land under the conveyance from his grandfather, and sought to prevent the appellee lumber company from entering upon the land to cut this timber or removing it from the premises, alleging that its deed was a cloud upon his title, and that the timber gave to the land its principal value; that the appellee had obtained the deed by fraud from his grandfather, and the evidences of his (appellant's) rights were of record, and known by the defendant. A demurrer was sustained to the petition, and the petition dismissed.

It is insisted by counsel for the appellant that no estate of any kind was created by Jesse Phillips before his death, and that his right to dispose of either the timber or land so as to pass the fee never having been parted with, the conveyance to the appellee gave it a full and perfect right to the timber. This contention of counsel is based upon the provision in the deed to his wife and grandson, which says: "This deed is not to take effect until the death of Jesse Phillips," and the sale of the timber having been made before that deed took effect the title to the purchaser is complete.

The case of *Leaver v. Gauss*, 62 Iowa, 314, used the language: "To commence after the death of the grantors, it being understood between the grantors and the grantee that the grantee shall have no interest in the premises as long as the grantors, or either of them, shall live"; and it was held

that the provision in that instrument was testamentary in its character, ⁴⁴⁸ and revocable at any time by the grantor. Other cases have been cited, and proceed on the idea that a postponement of the enjoyment of the estate by the grantor leads to the conclusion that the gift or grant is testamentary and revocable, unless it plainly appears that a future interest was presently given and irrevocable: *Babb v. Harrison*, 9 Rich. Eq. 111; 70 Am. Dec. 203; *Turner v. Scott*, 51 Pa. St. 126.

It may be said that where no interest is vested or contingent in the grantee until the death of the maker, and no intent to pass title, the doctrine contended for must prevail. The language used must fix the interest of the grantee, and determine whether the instrument is a deed or merely testamentary in its character.

The fundamental rule in the construction of both wills and deeds is to give effect to the intention of the party executing the instrument, and this is to be arrived at by the language used as found in the entire writing.

It is manifest to us, after reading carefully the conveyance to the wife and grandson, that the grantor's intent was to retain possession and control of the land, in so far as the right to its cultivation and its products was concerned, during his life, and after his death to his wife for life, and then to his grandson. He conveyed the estate to his wife for life, and then to John, but the draftsman, seeing that this would deprive the grantor of all interest, provided that the deed was not to take effect until his, the grantor's, death, and Jesse Phillips is to have full possession ⁴⁴⁹ of said farm during his life, and to have all proceeds of said farm until his death. The plain meaning and intention of the testator was to give, and he did give, after his death, a life estate to his wife with remainder over to John. It was a vested remainder in John from the moment the deed was executed and recorded or delivered to him, and while the grant is expressed in awkward terms, it is in no manner ambiguous, but a plain conveyance to his wife for her life, after his death, and then to John. It is like any other estate in remainder where the title vests at the execution and delivery of the deed, but the enjoyment of the estate is postponed until the preceding particular estate is ended. The grantor, by using the language, "this deed not to take effect until my death," meant only that neither John nor his wife was to have the control of his

farm or the proceeds until I die; nor is this only an inference from the words used, but the grantor so states in plain and unmistakable language. He made no reservation of the right to sell the land before he died, but retained, as a life tenant, the power to control and manage it, and use its products as he pleased, postponing the time of occupancy by his wife or John until his death. The grantor, by the grant, divested himself of all title save his life estate: *Reynolds v. McFarland*, 10 Ky. Law Rep. 932.

It is further urged that as this deed was only for a good consideration—that of love and affection—and the appellee had paid full value for the timber, it should be allowed to hold it, unless there was actual notice of the grantor's deed to the appellant, and the failure ⁴⁵⁰ to make such an averment rendered the petition defective if the main ground relied on is held to be insufficient. We think the petition, from which we have already quoted, presents a cause of action, and the allegations must be in some manner controverted, else the appellant is entitled to recover.

The judgment sustaining the demurrer is reversed, and the cause remanded for proceedings consistent with this opinion.

DEED OR WILL—CONSTRUCTION OF WRITING—INTENTION.—In arriving at a conclusion as to whether a written instrument, doubtful in its character, but posthumous in its operation, is a deed or a will, the controlling inquiry is the intention of the maker: *Sharp v. Hall*, 86 Ala. 110; 11 Am. St. Rep. 28; *Wall v. Wall*, 30 Miss. 91; 64 Am. Dec. 147; *Robertson v. Dunn*, 2 Murph. 133; 5 Am. Dec. 525. See the extended note to *Burlington University v. Barrett*, 92 Am. Dec. 383.

DEEDS TO TAKE EFFECT AFTER GRANTOR'S DEATH.—A conveyance, otherwise perfect in form, is not converted into a will by inserting in it a clause declaring that it is to go into effect after the death of the grantor, and that he claims to hold the land so long as he lives: *Seals v. Pierce*, 83 Ga. 787; 20 Am. St. Rep. 344, and note; *Evans v. Smith*, 28 Ga. 98; 73 Am. Dec. 731; *Cable v. Cable*, 146 Pa. St. 451; *Wall v. Wall*, 30 Miss. 91; 64 Am. Dec. 147. A deed, if made with a view to the disposition of a man's estate after his death, will inure in law as a devise or will: *Wellborn v. Weaver*, 17 Ga. 267; 63 Am. Dec. 235, and extended note; *Carlton v. Cameron*, 54 Tex. 72; 38 Am. Rep. 620, and extended note. An instrument is not a deed if the interest created does not arise until the death of the donor or some future time, although it be denominated a deed by the maker: *Babb v. Harrison*, 9 Rich. Eq. 111; 70 Am. Dec. 203, and note.

SCOTT v. COMMONWEALTH.

[94 KENTUCKY, 511.]

EVIDENCE — CONFIDENTIAL COMMUNICATIONS — HUSBAND AND WIFE — A letter written by a husband to his wife while he is imprisoned on a charge of murder, and voluntarily surrendered by her, is a confidential communication, not admissible in evidence against him on his trial, especially when its effect is to lessen the force of the testimony tending to show that the deceased and the wife of the accused were criminally intimate, and that the murder was committed in sudden passion and excitement produced by a knowledge of that fact. The admission of such letter in evidence is prejudicial and reversible error.

Smoot & Gudgell, for the appellant.

W. J. Hendrick, attorney general, and *C. W. Goodpaster*, for the appellee.

⁵¹² **LEWIS, J.** The evidence in this case of witnesses present shows that about, or soon after, nightfall, appellant went through the back door into the storehouse of deceased, situated in a village where they both resided, and, without other warning than simply pronouncing the given name of deceased, commenced to fire his pistol at and killed him, so that, although deceased fired also very soon after appellant's first shot, and both continued to fire until as many as seven or more shots were exchanged, there is no ground whatever upon which to base the excuse of self-defense. The jury, however, found a verdict of manslaughter only, fixing punishment at confinement in the penitentiary sixteen years.

We perceive no error in instructions to the jury, and the single inquiry left is, whether the court erred in permitting read in evidence a letter which appellant, ⁵¹² while confined in jail, wrote to his wife. Appellant, on being cross-examined as a witness in his own behalf, admitted he wrote the letter, and identified it. But that does not seem to us to legalize the evidence, if not otherwise competent, inasmuch as he was required by the court, over his objection, to answer questions relative to the letter propounded by the commonwealth. He testified on the trial that he committed the homicide in a state of passion and excitement, caused by belief his wife and deceased were criminally intimate; that his suspicion was aroused by their conduct at the railroad depot in Mt. Sterling the day before, when they were together, as he believed, by prearrangement; that after their return home, and on the day of the killing, he sought an interview with deceased at

his storehouse, and, as other witnesses also testify, harsh language passed, or rather was used by appellant; that, being harassed with suspicion, he asked his mother, who lived at his house, if she believed his wife was unfaithful, and the affirmative answer to his question, and his mother's statement that about one week previously she had seen his wife and deceased together at night, and under circumstances showing they were guilty, caused him to seek deceased and take his life.

In addition to the information given to appellant by his mother, the correctness of which she swore to on the trial, other witnesses testified to conduct on various occasions of deceased and appellant's wife inconsistent with their innocence, and from which the jury was authorized to infer they had been criminally intimate.

514 Although manslaughter is an offense in every case without legal excuse, still it is the policy of the statute to vary the punishment, so as to suit circumstances of aggravation or extenuation as the case may be, and hence the margins fixed are not less than two nor more than twenty-one years. It thus becomes a substantial error of court to permit incompetent evidence to go to the jury, the natural effect of which is to either increase or lessen the punishment that would be otherwise inflicted. An invasion of marital rights by a seducer or adulterer is always treated as a great provocation, and juries are prone to palliate the offense and lessen the punishment of a party who takes the wrongdoer's life under sudden heat and passion induced thereby. The letter in question, we need not quote it, does not contain an admission in terms that appellant then believed his wife innocent of wrongdoing with deceased, but does contain expression of affection for and desire to see her. It seems to us the natural effect of that letter upon minds of the jury, and from the severity of punishment inflicted the actual effect, was to lessen or break the force of other testimony tending to show the guilt of the deceased, and thereby deprive appellant of that extenuating fact. If, therefore, it was error to admit the letter as evidence, it must be treated as reversible error.

The rule excluding husband and wife testifying for or against each other in a criminal prosecution, except in case of personal injury by one to the other, is, as stated in 1 Greenleaf on Evidence, section 334, founded partly on the identity

of their legal ⁵¹⁵ rights and interests, and partly on principles of public policy which lie at the basis of civil society. "For it is essential to the happiness of social life that the confidence subsisting between the husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down and impair the great principles which protect the sanctities of that relation would be to destroy the best solace of human existence."

In *Elswick v. Commonwealth*, 13 Bush, 155, this court, citing as authority Greenleaf on Evidence, and Philips on Evidence, uses this language: "Information coming to a husband or wife in consequence or by reason of the existence of the marriage relation is to be treated as confidential, and the confidence which the law creates while the parties remain in the most intimate of all relations cannot be broken even after that relation has been dissolved."

In *McGuire v. Maloney*, 1 B. Mon. 224, it was to the same effect held that policy of the law so far protects that privacy and confidence essential to the marriage relation and that necessarily spring from it, as not only not to allow, but prevent, even after termination of the coverture, any disclosure by the wife in a court of justice, which implies a violation of the confidence which was reposed in her as a wife.

The evidence in this case shows the letter in question was procured from appellant's wife by a brother of the deceased, and thus came into possession of the commonwealth's attorney. But it seems to us, whether given up by her voluntarily or obtained against her will, it was a disclosure of what had ⁵¹⁶ been written by her husband in the privacy and confidence of the marital relation, and the use of it against the husband in this case was just as much against the policy of the law, because as fully within the reason for it, as would have been a disclosure of what he had said to her in confidence and privacy of the marriage relation.

The case of *Selden v. State*, 74 Wis. 271, 17 Am. St. Rep. 144, was a prosecution of a person for perjury, who, in a proceeding against his wife for divorce, made affidavit he did not know her place of residence; and the question on the trial was whether letters written by him to her pending proceeding for divorce, showing he did know her place of residence, and which she had placed in possession of her attorney, were competent evidence against him in the criminal trial. Applying the rule mentioned, it was there held that the

letters being confidential communications, not even the address on the envelopes could be used as evidence against the husband; and, in support of the ruling in that case, numerous decisions of English and American courts are cited.

In our opinion admission as evidence in this case of the letter written by appellant to his wife was an error prejudicial to his substantial rights, and the judgment is reversed for a new trial consistent with this opinion.

HUSBAND AND WIFE.—INSTANCES OF PRIVILEGED COMMUNICATIONS between which may not be disclosed; See monographic note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 411.

AMERICAN ACCIDENT COMPANY v. REIGART.

[94 KENTUCKY, 547.]

INSURANCE.—POLICIES OF INSURANCE MUST BE LIBERALLY CONSTRUED in favor of the assured, so as not to defeat, without plain necessity, his claim to indemnity, and when the words are without violence, susceptible of two interpretations, that which sustains the loss must, in preference, be adopted.

ACCIDENT INSURANCE.—DEATH CAUSED BY MEAT accidentally passing into, and lodging in, the windpipe while eating is a death through external and violent means, within the meaning of an accident insurance policy limiting recovery to death caused by "external, violent, and accidental means."

ACCIDENT INSURANCE.—UNNATURAL DEATH, the result of accident of any kind, imports an external and violent agency as the cause within the meaning of an insurance policy limiting recovery to death caused through "external, violent, and accidental means."

EVIDENCE—BURDEN OF PROOF—CONCLUDING ARGUMENT.—In an action on an accident insurance policy, the defendant having answered by denial that the death was caused by accident as alleged in the complaint, the burden of proof is on the plaintiff, who is entitled to the closing argument, and the defendant cannot afterwards set up that its denial was bad; that it was entitled to the burden of proof and to the closing argument.

L. W. Robertson and T. H. Hines, for the appellant.

Cochran & Sons and J. F. Lacy and E. W. Hines, for the appellee.

548 **PRYOR, J.** The appellee, Julia J. Reigart, the widow of Thomas J. Reigart, instituted this action in the Mason circuit court to recover five thousand dollars upon an accident policy, issued by the American Accident Company of

Louisville, Kentucky, to said Reigart, and made payable to his wife if she survived him.

Her husband lost his life by eating a piece of beefsteak, that, in the attempt to swallow, accidentally passed into his windpipe, choking him to death in a few moments. By the terms of the policy the insurance was made payable for injury or death received through external, violent, and accidental means. That the death of the insured was accidental is conceded, but it is contended that the contract of insurance only embraces accidental injuries caused by external violence or accidents brought about by means externally violent.

It is argued that the act of chewing or eating food is natural and harmless, and if, in eating, a part of the food passes into the windpipe, causing death, it cannot be said that death was produced by means of external violence or force; in other words, that the plain meaning of the language of the policy, "through ⁵⁴⁹ external, violent, and accidental means," is that the accident causing death must have been caused by an external force. The court below, placing a different construction on the contract, said in effect to the jury, if the death was accidental and caused by the passing of the steak into the windpipe, they should find for the plaintiff.

The rule laid down by Mr. May in his work on Insurance, third edition, section 175, is as follows: "No rule, in the interpretation of a policy, is more fully established or more imperative and controlling than that which declares, in all cases, it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to indemnity, which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain and cover the loss must, in preference, be adopted." And we might add that no construction should be placed upon such contracts as would defeat the intention of both parties, as it is manifest, if the interpretation given the language of this policy by counsel for the defense is adopted, it would defeat the intention of both the contracting parties.

The doctrine of this court as announced in *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300, 12 Am. St. Rep. 484, where the authorities were reviewed on the question there presented, recognizes fully this rule of construction, and that regard

must be had to the purpose sought to be accomplished by both the parties.

This appellant is an accident insurance company, ⁵⁵⁰ and its policies are termed "accidental policies," and the very object of insuring in such companies is to obtain indemnity where an injury or death results from accident. And while the policy provides that the liability arises where the injury "is through external, violent, and accidental means independently of all other causes," it was not designed that there should be such external violence, as a fall, a kick, or a blow on the person, as would cause death or an injury before the liability of the company could arise. This language was inserted in the contract to protect the company against hidden or secret diseases resulting in injury where there was no manifestation of harm to the external body. They were not attempting to restrict their liability to a particular kind of accidents, but were guarding the contract by the use of such terms as would prevent liability for injuries not originating from accidental causes, and that were liable to occur at any time from natural causes.

If the steak had been putrid, causing the stomach to revolt at it, or so tough as to interfere with digestion, or to completely stay the operations of nature in such a manner as to produce disease, no one would contend that the pain or the disease was the result of accident, or that the terms of this policy embraced such a case, but when the substance causing the death is visible and placed in the mouth of the assured, lodging by accident in the windpipe instead of the stomach, producing injury or death, it is as much an accident as if the assured had taken arsenic under the belief that it was some harmless medicine. There ⁵⁵¹ is no external force or violence from the poison, and the injury internal in its character, and yet the authorities hold that the insurance company is liable in such a case: *Healey v. Mutual Accident Assn.*, 133 Ill. 556; 23 Am. St. Rep. 637. It is plain, we think, that the means or that which caused the injury should be external, and not that the injury should have been external.

It is said, however, that if the injury is not to be external, that the death must have resulted from violent and accidental means. It is universally understood when it is said "that one died a violent death" that it was unnatural—a death not occurring in the ordinary way, and in fact the definition of the word "violent" is "unnatural," and in using

this word the insurance company was attempting to prevent the insured from asserting a claim when the injury or death was the result of some natural cause.

In the case of *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758, on a similar policy, it was held "that a death unnatural, the result of accident, imports an external and violent agency as the cause." This same view was taken by the Illinois supreme court in the case of *Healey v. Mutual Accident Assn.*, 133 Ill. 556; 23 Am. St. Rep. 637, already cited. A similar construction to the verbiage of like policies has been heretofore given by courts of last resort, and if companies organized as this is intended that actual external force causing the accident must be shown before a recovery could be had, it would be easy to so frame the language of the policy as to leave no doubt as to its meaning. The instructions below were proper, and, in our opinion, the widow is entitled to recover.

⁵⁵² Another ground of reversal is the refusal of the court below to give to appellant's counsel the concluding argument. A demurrer had been overruled to the petition, which, in effect, was a decision for the plaintiff if the accident occurred as alleged. The legal question was therefore settled, but there were two defenses to the claim: 1. A denial that the accident causing the death happened as alleged by the plaintiff; 2. That the deceased was under the influence of intoxicating drinks when the accident occurred, and that, by an express provision of the policy, this exempted the appellant from liability. The proof failed to sustain the second ground of defense, and the denial that the accident was caused as alleged was the only issue of fact that the appellee was required to establish. The overruling of the demurrer did not dispense with the necessity of the plaintiff showing that the death of the intestate was caused by the accident as alleged; and while the sufficiency of the answer may be questioned by reason of the manner in which the denial is made, still it was the appellant's defense, and it attempted by it to place the burden on the plaintiff, and will not be allowed now to say that, because its pleading was bad, the burden was on the plaintiff.

The judgment below must be affirmed.

INSURANCE—CONSTRUCTION OF POLICY.—An insurance policy will be construed most strongly against the insurer: *Renshaw v. Missouri etc. Ins. Co.*,

103 Mo. 595; 23 Am. St. Rep. 904; *Philadelphia Tool Co. v. British American Assur. Co.*, 132 Pa. St. 236; 19 Am. St. Rep. 596, and note. If there is any reasonable doubt as to the meaning of the language in a policy of insurance it is to be resolved in favor of the insured: *De Graff v. Queen Ins. Co.*, 38 Minn. 501; 8 Am. St. Rep. 685, and note; *Western etc. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346; 27 Am. St. Rep. 703; *Queen Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51.

INSURANCE AGAINST ACCIDENTAL DEATH—MEANING OF.—The word "accident" is construed to include a casualty, or something out of the usual course of events which happens without any design on the part of the person injured: *Richards v. Travelers' Ins. Co.*, 89 Cal. 170; 23 Am. St. Rep. 455, and note; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; 8 Am. St. Rep. 756, and extended note thoroughly discussing the subject.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

HUDSON REAL ESTATE COMPANY v. TOWER.

[161 MASSACHUSETTS, 10.]

CORPORATIONS.—A SUBSCRIPTION TO THE STOCK OF A PROPOSED CORPORATION MAY BE WITHDRAWN at any time before its organization by an oral notification of such withdrawal given to another subscriber, who is acting as a member of the committee of subscribers appointed to manage their business, and who has been chosen their president. Notice to the other subscribers is not necessary.

CORPORATIONS.—A SUBSCRIPTION TO THE STOCK OF A PROPOSED CORPORATION IS REVOKED BY THE DEATH of the subscriber before it is formed.

CORPORATION.—A SUBSCRIPTION TO THE STOCK OF A PROPOSED CORPORATION MAY BE WITHDRAWN, THOUGH OTHER SUBSCRIBERS have acted on the strength of the subscription, if the corporation has not been formed.

ACTION upon a subscription to the stock of a proposed corporation. The defendant proved, against the objection of the plaintiff, a conversation between the defendant and a solicitor at the time the subscription was made, and also a conversation between the defendant and Henry Tower before the formation of the corporation was completed, to the effect that, if the associates voted to place a mortgage on the property, the defendant would not be bound by his subscription, and would revoke the same, and that, after such conversation, a vote to make such mortgage had been carried.

J. T. Joslin and R. E. Joslin, for the plaintiff.

J. E. Cotter and H. S. Ormsby, for the defendants.

¹¹ **ALLEN, J.** It was heretofore decided in this case, that until the organization of the corporation the defendants' subscription was a mere proposition or offer, which might be

withdrawn, like any other unaccepted offer: *Hudson Real Estate Co. v. Tower*, 156 Mass. 82; 32 Am. St. Rep. 434. The principal question which the plaintiff now seeks to present is, whether, upon the evidence, and under the ruling of the court, the jury were warranted in finding a legal withdrawal or revocation of the subscription.

The only withdrawal or revocation relied on occurred in an interview between one of the defendants and Henry Tower, on August 31, 1889, and in view of the verdict the only question left is, whether a notification of withdrawal given orally to Henry Tower was sufficient.

It will be necessary to state the situation of the parties. The contract declared on is given below.*

The corporation was organized under the laws of Maine. The meeting for the organization was held at Portland, Maine, August 29, 1889, at which time the articles of agreement, having been signed, were presented, by-laws were adopted, and officers were chosen. The necessary papers were then prepared as required by law, and were approved by the attorney general of Maine on September 5th, were recorded on September 6th,¹² and were received and filed in the office of the secretary of the state on September 7, 1889. It was agreed at the argument that, under the laws of Maine, the legal existence of the corporation, as a corporation, began on September 7th.

On the 31st of August Henry Tower's position was as fol-

* "We, the undersigned, hereby subscribe for and agree to purchase the number of shares set against our respective names of the capital stock in a corporation to be organized under the laws of such state, as a committee hereafter to be appointed from the subscribers shall determine, said shares of capital stock to be of the par value of fifty dollars, and the capital stock of said corporation to be not less than twenty-five thousand dollars, said corporation to be organized for the purpose of purchasing land, and erecting a shoe-shop thereon, with the necessary appliances connected therewith, in the town of Hudson, to be rented, when completed, to H. H. Mawhinney & Co. for a term of ten years, at a rental of seven per cent per annum on the cost of the plant when completed. Said corporation to be organized as soon as may be, and in advance thereof an agreement in writing between a committee of the subscribers, in behalf of all, with said H. H. Mawhinney & Co., to be executed, binding the latter to take said plant for the period and at the terms stated, and, on the organization of said corporation, to be re-executed to bind both parties. And the subscribers hereto hereby bind themselves, severally, to pay for said stock, to the treasurer of said corporation, in the way and manner that the corporation, when organized, shall determine. And we severally agree that one seal shall be the seal of each.

"Hudson, August 7, 1889."

lows: It must be assumed, though the bill of exceptions does not in express terms so state, that he was one of the subscribers. One of the plaintiff's requests for instructions assumes that there was a contract of the firm above referred to "with Henry Tower and others, in behalf of the associates, for the purchase of land, and building a shoe-shop thereon, dated August 19, 1889." This contract, being thus referred to by the plaintiff as an undisputed fact, must be taken to show that Henry Tower was acting as the person first named on the committee contemplated by the subscription paper, to obtain an agreement in writing binding said firm to take a lease of the premises. On August 29th, at a meeting which apparently was the first formal step in the organization of the corporation, he was chosen president. By the statutes of Maine, which it was agreed we should refer to, the choice of officers is a necessary preliminary to the creation of the corporation: Rev. Stats. of Maine of 1883, c. 48, secs. 17-19.

It is also obvious that on August 31st he was, in the opinion of the jury, acting as an officer in behalf of the associates and not merely on account of his personal interest as one of the subscribers. Such is the fair result of the instructions, taken as a whole. The judge, in the course of his charge, called the jury's attention to this distinction by saying: "If Henry Tower was one of the officers of the associates for the purpose of managing their business it would not be necessary that any other notice should be given than what was given to him; but if he went there simply as being interested, not acting as an officer, . . . it may be that he was not an officer so that he would be a party authorized to receive any notice of withdrawal, and, if he was not, then it would be necessary for that fact to be communicated to the meeting." It being pointed out to the judge, at the close of the charge, that the plaintiff's records showed that at the meeting on August 29th Henry Tower was chosen president, he further instructed the jury that if he had been so chosen president, and if the defendants notified him distinctly that, if a certain event ¹³ should happen with reference to the change of the policy of the corporation as to mortgaging its property, they would no longer be in the association, and would not pay a cent on their subscription, that would be a sufficient notification of their withdrawal if the event did happen. The undisputed testimony, so far as it is recited or disclosed in the bill of exceptions, goes to show that Henry Tower, in that interview,

was acting in a representative capacity, and not merely on his own personal account. The plaintiff's requests for instructions raised no question on this point, but asked the court to rule that, "in order to constitute a valid withdrawal, the defendants must do some act or make some unequivocal or unconditional statement to the proper officer or officers of the associates which shall amount to a public withdrawal from said contract." The instructions were given with reference to this request, and, as we understand them, they amounted to this, that Mr. Tower having been chosen as president, and acting for the associates, was, on August 31st, a proper officer to be notified by the defendants of their withdrawal.

We think this instruction was right. No instruction was asked at the trial that, in order to withdraw from the associates, notice must be given to all of them individually, or at a meeting of the associates. The plaintiff only contended that the notice must be given to the proper officer or officers; and it would plainly be impracticable to require a direct personal notice to them all. The right to withdraw would be nugatory if this were necessary. A subscriber who has a right to withdraw may not know, or have the means of knowing, who all of his associates are, or where they live. If he does know, they may be many in number and widely scattered, or some of them may be away on a journey. No general meeting of them may be called which he can attend without leaving the state. He need not wait for a meeting before giving his notice of withdrawal. It was, indeed, held in an early case in England that all of the other subscribers must not only have notice, but must actually consent, before one of the subscribers could withdraw: *Kidwelly Canal Co. v. Raby*, 2 Price, 93. But now, in England as well as here, no such consent is necessary. If every one of the other subscribers should object, yet it is the right of a subscriber to withdraw before the corporation is formed. It is ¹⁴ merely a question of giving due notice of his withdrawal. And in England it is not intimated in any modern case, so far as our examination has gone, that notice must be given to all the other subscribers, or at a meeting of subscribers. The retraction has usually been made to the same persons to whom the application for shares was made: See *Lindley on Partnership*, 4th ed., 99-105, and numerous cases cited.

In this country no case has been cited, and we have found

none, discussing the question what notice of withdrawal will be sufficient. In some cases no attempt to withdrawal was made till after the corporation was formed: See, for examples, *International Fair etc. Assn. v. Walker*, 83 Mich. 386; *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248; 33 Am. St. Rep. 234; *Ashuelot Boot and Shoe Co. v. Hoit*, 56 N. H. 548; *Shober v. Lancaster County Park Assn.*, 68 Pa. St. 429. It is said in *Cartwright v. Dickinson*, 88 Tenn. 476, 17 Am. St. Rep. 910: "Before the organization of the corporation and acceptance of the subscription . . . the promoters might, perhaps, agree to release a subscriber by substituting other names for his." This goes on the idea that the subscriber has not an absolute right to withdraw, and that somebody's assent is necessary. In *Plank's Tavern Co. v. Burkhard*, 87 Mich. 182, the subscriber apparently made known his refusal to the persons who brought a second paper to be signed by him, and it was held to be sufficient, but the proper mode of giving such notice is not discussed, and the court incidentally remarked that "the incorporators well knew when the company was organized . . . that the defendants expressly repudiated the whole arrangement." It is held that the death of a subscriber before the formation of the corporation is a revocation of a subscription: *Phipps v. Jones*, 20 Pa. St. 260; 59 Am. Dec. 708; *Wallace v. Townsend*, 43 Ohio St. 537; 54 Am. Rep. 829; *Pratt v. Elgin Baptist Society*, 93 Ill. 475; 34 Am. Rep. 187; *Sedalia etc. Ry. Co. v. Wilkerson*, 83 Mo. 235. Insanity is also held to be a revocation in *Beach v. First Methodist Episcopal Church*, 96 Ill. 177. Death is a public fact, of which all the world must take notice, though the above decisions were not put on that ground: *Marlett v. Jackman*, 3 Allen, 287; but insanity is not. In most of the cases where the right of withdrawal of a subscription has been held to exist there is nothing to show that all the other subscribers ¹⁵ were notified, and there has been no question as to the sufficiency of the mode in which the withdrawal was made: See, in addition to the cases above cited, *Auburn Bolt and Nut Works v. Shultz*, 143 Pa. St. 256; *Muncy Traction Engine Co. v. Green*, 143 Pa. St. 269; *Garrett v. Dillsburg etc. R. R. Co.*, 78 Pa. St. 465; *Strasburg R. R. Co. v. Echternacht*, 21 Pa. St. 220; 60 Am. Dec. 49. An offer of reward made by public proclamation may be withdrawn in the same manner, and the fact that a claimant of the reward was ignorant of the withdrawal of the offer is immaterial: *Shuey*

v. *United States*, 92 U. S. 73. And if not withdrawn by any express notice, a withdrawal is implied after the lapse of a considerable time: *Loring v. Boston*, 7 Met. 409.

In the present case it seems to us that Henry Tower was a proper person to whom a withdrawing subscriber might give notice of his withdrawal. So far as appears in the bill of exceptions, there was no other officer or person who so well or fully represented the subscribers at large. He was at the head of the principal committee, and in addition to this he had been selected and chosen as president, and he was acting in behalf of the subscribers. There is nothing to show that the chairman of the meetings had any duties except merely as presiding officer at the meetings. Taking the case as it stood, and in view of the requests for instructions which implied that the notice of withdrawal would of course be given to some officer, and of the fact that nobody else was suggested as the proper officer or person to receive the notice, the ruling of the court was right, that notice to him was sufficient; and the fact that the association did not come into legal existence as a fully formed corporation till a later date does not render the notice to him insufficient, under the circumstances.

The plaintiff requested a ruling that the defendants could not withdraw after the associates had taken action on the strength of their subscription. This was rightly refused, as was held in the former decision.

The plaintiff also asked an instruction that the defendants' offer was not conditional, and could not be made so by oral testimony. This instruction was given.

The evidence to which the plaintiff objected was properly admitted for the purpose for which it was received, and the instructions to the jury carefully limited it to that purpose, and confined the attention of the jury to the single point of the defendants' withdrawal of their subscription.

Exceptions overruled.

CORPORATIONS—SUBSCRIPTION TO STOCK OF CORPORATION TO BE FORMED. An agreement to subscribe to the stock of a corporation to be thereafter formed does not make such subscriber a member of the corporation: *West v. Crawford*, 80 Cal. 19; *Fanning v. Insurance Co.*, 37 Ohio St. 339; 41 Am. Rep. 517. A contract to subscribe to corporate stock is complete when the corporation is organized: *Penobscot R. R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 257, and note; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172; 63 Am. Dec. 654, and note; *Richelieu Hotel Co. v. International etc. Encampment Co.*, 140 Ill. 248; 33 Am. St. Rep. 234, and note; *Marysville Electric Light etc. Co.*

v. *Johnson*, 93 Cal. 538; 27 Am. St. Rep. 215, and note; and at any time prior to such organization such subscription may be withdrawn: *Hudson Real Estate Co. v. Tower*, 156 Mass. 82, 32 Am. St. Rep. 434, and note. A subscriber for stock in a corporation cannot withdraw his subscription even though it is conditional, unless unreasonable delay exists in performing the condition: *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298, and note. Subscription by one to stock in a proposed corporation is a contract binding and irrevocable from the date of the subscription: *Minneapolis etc. Machine Co. v. Davis*, 40 Minn. 110; 12 Am. St. Rep. 701. See, also, the extended note to *Parker v. Thomas*, 81 Am. Dec. 392.

BLATT v. MCBARRON.

[161 MASSACHUSETTS, 21.]

PROCESS, RIGHT TO ENTER THE PREMISES OF A STRANGER TO SERVE.—

A constable is not justified in entering a building for the purpose of serving civil process on a person whom he believes to be therein, if such person is not there, and the owner of the building has done nothing to induce the officer to believe that the person he sought is to be found there.

CRIMINAL AND CIVIL PROCESS, DIFFERENCE BETWEEN THE RIGHT OF AN OFFICER TO ENTER A BUILDING UNDER.—An officer charged with the service of criminal process has the right to enter the building of a stranger if such officer believes in good faith that the person whom it is his duty to arrest is to be found therein, though such belief is erroneous; but under civil process the right of the officer to enter the building is dependent on the person whom he seeks being therein, and being a trespasser in entering, the officer assumes all risks arising from the condition of the building and its want of proper repair.

OWNER OF BUILDING IS NOT LIABLE FOR INJURIES RECEIVED BY A TRESPASSER THEREIN.—Hence if an officer charged with the service of civil process enters a building in which he believes the defendant to reside, for the purpose of serving such process, but the defendant does not reside there, and the officer is injured while in such building from its dangerous condition, he cannot recover of the owner for the damages suffered, because such officer is a mere trespasser, to whom the owner owes no duty.

TORT for personal injuries. The trial judge directed a verdict in favor of the defendant, and reported the cause at the plaintiff's request to the supreme court for its determination.

E. Greenhood and A. S. Cohen, for the plaintiff.

E. N. Hill, for the defendant.

²¹ **BARKER, J.** The plaintiff contends that he had a right to enter the defendant's building, because he was a constable qualified to serve civil process, and had in hand for service a

writ against a person who, as he supposed, resided in the building, but who in fact did not live there, but in another house on the opposite side of the street, and who was not in the building which the plaintiff entered. The defendant was a stranger to the process which the plaintiff was undertaking to serve, and it is not contended that she had in any way induced the plaintiff to believe that the person against whom the process ran was in the building which the plaintiff entered, nor that he had ever been in any way connected with that building.

Under these circumstances we are of opinion that the plaintiff had no right to enter the defendant's building, and that in entering it he was a trespasser. This conclusion does not rest upon ²² the fact that the building was a dwelling, nor that the entrance to it was closed. It was in fact a tenement-house, not occupied by the defendant, but by tenants at will, and the entrance by which the plaintiff gained admission was not only open, but had no door. The plaintiff was a trespasser, because his office and his writ gave him no right to enter upon the property of a stranger, unless the person whom the writ directed him to serve with a summons either resided there or was actually in the building.

While it is for the public interest that officers charged with the duty of serving civil process should be clothed with such powers as will enable them to comply with their precepts, it yet is not necessary that they should have the right to enter any premises where they may suppose the person to be of whom they are in search; and if, without inducement from the owner or those in occupation, they see fit to enter a building where the person sought does not reside, they are properly held to do so at their peril, and, if he is not in fact there, they enter without right and as trespassers. In this respect their rights and powers are less than those of officers charged with the execution of warrants to arrest alleged criminals, or of those whose duty it is to arrest criminals without warrant. In such cases the officer may enter the house of a stranger and search there for the person named in his warrant, although that person is not there, if the officer has reasonable cause to believe that the person against whom he holds the warrant, or whom it is his duty to arrest without a warrant, is in the house: *Commonwealth v. Irwin*, 1 Allen, 587; *Commonwealth v. Reynolds*, 120 Mass. 190; 21 Am. Rep. 510; *Parker v. Barnard*, 135 Mass. 116, 117; 46 Am. Rep. 450.

But there is a clear distinction, both upon principle and authority, between such cases and those in which officers charged only with the service of civil process invade the premises of strangers, which do not in fact shelter those of whom they are in search. In such cases they act at their own risk, and are justified or shown to be trespassers by the event. And such is the current of authority. Thus, in *Biscop v. White*, Cro. Eliz. 759, trespass was brought for breaking the plaintiff's house. The defendant held a *fiery facias de bonis testatoris*, and, the plaintiff's house being open, entered to levy the debt. There were in the house *bona propria executricis*, not liable to execution, ²³ but no *bona testatoris*, and the plaintiff had judgment; but if *bona testatoris* had been in the house it was conceived that the plaintiff's entry would have been justifiable. So in Comyn's Digest, title Execution, chapter 5, it is said: "After a *fiery facias* delivered to him the sheriff may enter the house of the defendant, when the door is open, and seize the goods of the defendant there found, or the house of a stranger; and this by night or by day, if the door be open. But if it be the house of a stranger he ought to aver that the goods were there." In *Cooke v. Birt*, 5 Taunt. 765, Gibbs, C. J., says: "Under a *fiery facias* the sheriff cannot, on suspicion of finding the defendant's goods, enter the house of a stranger. . . . The sheriff, finding the door open, may enter the house of a stranger, and is justified if the defendant's goods are in it, but it is at his own risk." And, in the same case, Dallas, J., says: "The sheriff may enter the house of a stranger, if the door be open, but it is at his peril whether the goods be found there or not; if they be not he is a trespasser." So in *Johnson v. Leigh*, 6 Taunt. 246, the defendant's plea, averring only a suspicion that the person whom the defendant sought to arrest on mesne process was in the plaintiff's house, was held bad. And in *Morrish v. Murrey*, 13 Mees. & W. 52, it was held that an officer was not justified in entering and searching the house of a stranger for the purpose of arresting a debtor under a *capias ad satisfaciendum*, although the debtor had resided there before the entry, and the officer had reasonable cause to suspect that the debtor was there, if the debtor was not in the house at the time: See, also, *Semayne's case*, and notes in 1 Smith's Lead. Cas., 9th Am. ed., 228, 234-245. In *Platt v. Brown*, 16 Pick. 553, 556, the officer had the right to break open the plaintiff's

store for the purpose of attaching the goods of a third person, because the goods were in fact there.

As in our opinion the plaintiff was a trespasser upon the defendant's property, and had no lawful right or license of any kind to enter her building, there is no occasion to inquire whether the city ordinances stated in the report applied to the entrance where the plaintiff fell, or whether, if he had not been a trespasser, but had entered under license or of right, he could have recovered for his injuries under the doctrine held in the case of *Parker v. Barnard*, 135 Mass. 116; 46 Am. Rep. 450. Nor whether, if he ²⁴ had not been a trespasser, he could have been found to be in the exercise of ordinary care in entering a dark passage with which he was unacquainted, and walking forward until he fell downstairs.

Judgment on the verdict.

PROCESS—ENTERING PREMISES OF THIRD PERSON TO SERVE.—An officer who has a warrant for the arrest of one charged with a misdemeanor, and who has reasonable cause to believe that such person is in the dwelling of another, has the right to enter the house for the purpose of serving the warrant, and he cannot be treated as a trespasser though he failed to notify the owner of the house, and the person sought for is not there: *Commonwealth v. Reynolds*, 120 Mass. 190; 21 Am. Rep. 510. A house in which the defendant dwells, though owned and inhabited by others at the time, may be lawfully entered and searched by an officer to effect the defendant's arrest: *Hawkins v. Commonwealth*, 14 B. Mon. 395; 61 Am. Dec. 147, and extended note on the force that may be used to effect arrest both under criminal and civil process. But an officer has no right to arouse the family of a respectable citizen at night, and force an entry to the house upon the statement of some person that he has heard that a woman of bad character is stopping there: *Bailey v. Ragatz*, 50 Wis. 554; 36 Am. Rep. 862.

REAL PROPERTY—LIABILITY OF OWNER TO TRESPASSER.—The owner of private property is under no obligation to keep it in a safe condition for the benefit of trespassers, or those who may go upon them uninvited, from curiosity or motives of private convenience in no way connected with the owner: *Railway Co. v. Ferguson*, 57 Ark. 16; 38 Am. St. Rep. 217, and note, with the cases collected. See, also, the note to *Bedell v. Berkey*, 15 Am. St. Rep. 374, and the extended notes to *Cauley v. Pittsburgh etc. Ry. Co.*, 40 Am. Rep. 667, and *Sweeney v. Old Colony etc. R. R. Co.*, 87 Am. Dec. 652.

KELLEY v. KELLEY.

[161 MASSACHUSETTS, 111.]

DIVORCE.—ALIMONY AND COUNSEL FEES cannot be decreed except in a case specified in the statutes.

STATUTES OF OTHER STATES.—THERE IS NO PRESUMPTION that the statutes of another state are like those prevailing in this state.

JURISDICTION OF THE COURT OF ANOTHER STATE TO ENTER A JUDGMENT MAY ALWAYS BE INQUIRED INTO, and if the judgment was entered without jurisdiction it will not be enforced in this state.

JURISDICTION.—IF THE PROCEEDINGS OF A COURT OF GENERAL JURISDICTION ARE ACCORDING TO THE COURSE OF THE COMMON LAW they are presumed to be regular.

LAWS OF ANOTHER STATE—BURDEN OF PROOF.—If the question of the law of another state is in controversy the party on whom the burden of proof lies will fail, unless he produces evidence to sustain his views; and statutes and decisions which were not put in evidence during the trial cannot be used for the first time in the argument in the appellate court for the purpose of proving the law of another state.

CHANCERY HAS NO JURISDICTION TO ENTERTAIN A SUIT FOR THE NULLITY OF A MARRIAGE where no fraud, duress, or lunacy is charged, and the ground for avoiding the marriage is, that when it was contracted the woman had a former husband living, but is not shown to have led the other to contract the marriage through deception, or even through ignorance of the facts.

THE JUDGMENT OF A COURT OF ANOTHER STATE WILL NOT BE PRESUMED TO BE WITHIN ITS JURISDICTION where such jurisdiction, if it existed, must have been conferred by statute, and there is no evidence of such statute, or, if the statute existed, that the court acted within the jurisdiction given by it.

JURISDICTION OF A COURT OF RECORD OF ANOTHER STATE OF THE SUBJECT OF DIVORCE IS A SPECIAL authority not recognized by the common law, and its power must be shown, and must appear to have been strictly pursued.

C. Brigham, for the plaintiff.

H. F. Hurlburt and D. N. Crowley, for the defendant.

¹¹¹ ALLEN, J. In this commonwealth no power exists in any court to pass an order for the payment of alimony *pendente lite*, or of permanent alimony, in a matrimonial cause of any description, except under provisions of statute conferring such power. By the constitution of Massachusetts, chapter 3, article 5, it was provided that "all causes of marriage, divorce, and alimony . . . shall be heard and determined by the governor and council until the legislature shall by law make other provision." By the statutes of 1785, chapter 69, section 2, it was enacted that: "All marriages, where either of the parties shall have a former wife or ¹¹² husband

living at the time of such marriage, shall be absolutely void"; and by section 3, "Divorces from the bond of matrimony shall be decreed, in case . . . either of them the [parties] had a former wife or husband alive at the time of solemnizing such second marriage." In section 5 certain provisions for alimony are made, but none in case of such void marriage. By section 7, "All questions of divorce and alimony shall be heard and tried by the supreme judicial court." It is not necessary to make special reference to later statutes, which have always, since 1785, contained such provisions upon these subjects as seemed expedient to the legislature; and the authority of the court to decree alimony and counsel fees has always been considered to rest exclusively upon the statutes: *Shannon v. Shannon*, 2 Gray, 285; *Baldwin v. Baldwin*, 6 Gray, 341; *Coffin v. Dunham*, 8 Cush. 404; 54 Am. Dec. 769; *Davol v. Davol*, 13 Mass. 264; *West v. West*, 2 Mass. 223, 227; *Orrok v. Orrok*, 1 Mass. 341. In the absence of any thing to show the contrary there is a presumption that the common law of another state is like that prevailing here; but this presumption does not extend to the statutes of another state: *Harris v. White*, 81 N. Y. 532, 544; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17.

In the case now before us it appears that in 1877 a husband brought, in the supreme court of the state of New York, a complaint against his wife, seeking to have his marriage annulled and declared void, on the ground that at the time of the marriage she had a former husband living. She answered to the complaint, admitting her former marriage, but averring that it was invalid and void, because her former husband was then married to another woman, and that these facts were known to the present husband at the time of his marriage to her. The complaint contained no charge of fraud, force, mistake, or lunacy. In 1888 an order was passed reciting the pleadings, and reciting that it appeared satisfactorily to the court that subsequently thereto an order was made, among other things, that the husband pay to the wife ten dollars a week alimony, commencing October 22, 1877; that it also appeared that he had wholly failed to do so from November 5, 1877, though due demand had been made; and that he had failed to prosecute his action, and had departed from the state; and an order was made that the complaint be ¹¹⁸ dismissed, with costs, that her attorney have an extra allowance of one hundred dollars, and that the

wife recover of, and have judgment against, her husband for six thousand one hundred and fourteen dollars, being the amount of alimony due and owing to her under said order, and also for costs and the above allowance; and judgment was entered accordingly on April 17, 1888. It is also recited that counsel appeared for the husband at the time of the order in 1888. Judgment was entered accordingly, and, this husband having removed to this commonwealth, the wife now brings a suit in equity here, praying the superior court to order execution to issue upon said judgment. In defense no direct charge is made that the entry of this judgment was procured by fraud or imposition upon the court, but it is set up, and the court has found as a fact, that on April 27, 1887, about a year before the entry of the judgment in New York, the husband obtained in this commonwealth a decree annulling his marriage, his wife having been served with process and defaulted for nonappearance. There is nothing to show that this decree of nullity made here was known to the supreme court of New York at the time when the judgment there was entered. The order for the payment of alimony *pendente lite* is not set forth in the record, and does not appear otherwise than by the recital in the final order.

The principal question which we have to consider is whether it appears that the supreme court of New York had jurisdiction in the suit for nullity to pass an order for the payment of alimony *pendente lite*, and at the time of dismissing the suit to pass an order for the payment of the arrears of alimony down to the date of the order, and of an allowance for counsel fees and for costs, and to enter judgment thereon. Jurisdiction may always be inquired into, and a judgment entered without jurisdiction will not be enforced: *Simmons v. Saul*, 138 U. S. 439; *Thompson v. Whitman*, 18 Wall. 457, 468; *Cumington v. Belchertown*, 149 Mass. 223; *Cross v. Cross*, 108 N. Y. 628.

Ordinarily, and where the proceedings of a court of general jurisdiction are according to the course of the common law, there is a presumption in favor of the regularity of its proceedings, and it will be presumed to have had such jurisdiction as it has assumed to exercise, unless the contrary is shown: *Galpin v. Page*, 18 Wall. 350, 365. In the present case the justice of ¹¹⁴ the superior court reports that the defendant, among other defenses, contended that the judgment alleged had not

been proved, and he declined to enforce the judgment rendered in New York, but the special ground for his refusal is not stated. So far as appears, no evidence was introduced on the one side or on the other to show the jurisdiction and authority of the court in the matter. No evidence of the law of New York, by statutes or decisions of courts or otherwise, appears to have been presented; and there was nothing to sustain the jurisdiction except the fact that the supreme court, which was a court of general jurisdiction, assumed to exercise it. The question is whether this is enough in a proceeding of this kind.

In the argument before us certain statutes and decisions have been referred to which are supposed to bear upon the authority and jurisdiction of the court, and the fact is thus brought to our attention that there are statutes and decisions which relate to the subject. As already mentioned, the common law of another state is presumed to be the same as that which is established here, unless shown to be otherwise; but there is no such presumption in relation to statutes or to local laws or usages. These must be proved as facts at the trial, and, where a question of the law of another state is in controversy, the party upon whom the burden lies will fail, unless evidence is produced to sustain his view; and statutes and decisions which were not put in evidence at the trial cannot be used for the first time at the argument of the case before us for the purpose of proving the law of such state: *Hunt v. Johnson*, 44 N. Y. 27; 4 Am. Rep. 631; *Hull v. Mitcheson*, 64 N. Y. 639; *Hackett v. Potter*, 135 Mass. 349, 350; *Murphy v. Collins*, 121 Mass. 6; *Ufford v. Spaulding*, 156 Mass. 65, 69.

We therefore are not at liberty to place our decision upon the result of such examination as we might now be able to make, even with the aid of the citations by counsel of the statutes and decisions in New York in respect to marriage and divorce, nullity of marriage, and alimony, except so far as such decisions may throw light upon the rules of common law existing independently of the statutes.

We have, then, to consider, in the first place, whether it falls within the general jurisdiction of a court of chancery, without statutory authority, to entertain a suit for nullity of marriage in ¹¹⁵ a case where no fraud, duress, mistake, or lunacy is explicitly charged, and where accordingly no such ground is alleged as would enable such a court to annul an ordinary contract. The complaint of the husband in the present case,

as presented to the supreme court of New York, only charged, as a ground for avoiding his marriage, that, at the time when it was entered into, his wife had a former husband living, and that her marriage to such former husband was in full force and validity. It did not charge that he was led to marry her through deception, or even through ignorance of the facts. No doubt instances sometimes occur where a man and woman who wish to live together go through a form of marriage, for social or other purposes, taking the chance of subsequent disturbance or trouble, though well knowing that the marriage is void for the reason that one of them has a former husband or wife living, or that they are within prohibited degrees of kin. Both real life and fiction furnish illustrations of this. Such marriages are of course void, and may be declared so under the authority of statutes like those which have long existed in this commonwealth: Stats. 1785, c. 69, sec. 3; Rev. Stats., c. 76, sec. 3. But, in our opinion, a court of chancery would decline to act in such a case by virtue of its own inherent jurisdiction and without the authority of a statute enabling it to do so. The chief aid which we have derived in determining this question comes from the carefully considered decisions in New York, where the court has assumed jurisdiction to declare a marriage void for lunacy (*Wightman v. Wightman*, 4 Johns. Ch. 343), and fraud (*Ferlat v. Gojon*, Hopk. Ch. 478; 14 Am. Dec. 554); but has declined, for want of jurisdiction, to do so for impotence: *Burtis v. Burtis*, Hopk. Ch. 557; 14 Am. Dec. 563. In the last case the chancellor said: "The cases in which this court can annul marriages, in virtue of its powers as a court of equity, must be few and very peculiar; and they must appertain to the jurisdiction of equity." In *Griffin v. Griffin*, 47 N. Y. 134, the same question was incidentally discussed as follows, in a learned and elaborate opinion, delivered by Rapallo, J: "The court of chancery of this state has, in some cases, entertained bills to declare the nullity of marriages independently of any statute conferring jurisdiction. But these were cases in which the marriage was sought to be declared void for some ¹¹⁶ cause for which chancery had power to cancel or avoid all contracts, such as lunacy or fraud, and it was held that the marriage contract was not excepted from the operation of this general jurisdiction. . . . In all other cases it must be conceded that the jurisdiction of the court of chancery of this state, in actions for divorce, either on the ground

of nullity or for cause arising subsequent to the marriage, is founded wholly upon the statutes": Page 138. The court expressed no definite opinion on the question whether the particular case then before it, which was an action brought by a husband to have the marriage declared void by reason of her former marriage, would be cognizable by the court independently of the statutes: Page 140. And it does not appear in the report of the case whether or not there was any fraud or mistake. The same doctrine above stated was reiterated in the recent case of *Erkenbrach v. Erkenbrach*, 96 N. Y. 456, where the court, by Ruger, C. J., says: "The courts in this state have no common-law jurisdiction over the subject of divorces, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute. Previous to the revision of the statutes it was, however, held that the court of chancery had authority, by virtue of its general equity jurisdiction, to entertain suits to annul marriage contracts, upon the same grounds which authorized them to annul contracts generally. . . . Beyond this, however, the court of chancery refused to go": Page 463. Then, after quoting a portion of the passage above cited from the judgment in *Griffin v. Griffin*, 47 N. Y. 134, the court adds: "The provisions of the Revised Statutes constitute a comprehensive and detailed scheme for the treatment of matrimonial and domestic differences, framed with great care to define the rights and liabilities of the respective parties, and the power and duties of the courts": Pages 465, 466. This leaves the impression that at the time of rendering the decision, in 1884, the whole subject was deemed to be covered by legislation, to which the courts must look for their powers and authority; and, so far as we know, the same is the case since the adoption of the present code of that state: See, also 2 Bishop on Marriage, Divorce, and Separation, secs. 801-809, where the question is treated of, but no definite opinion expressed.

¹¹⁷ We have come to the conclusion that it does not fall within the general jurisdiction of a court of chancery, independently of authority by statute, to annul a marriage for the reasons set forth in the complaint made by the present defendant against the present plaintiff in the court of New York, and also that no such jurisdiction existed in that court at the time of entering the judgment now under consideration, or was asserted by it; and that whatever the court did, it as-

sumed to do under the express or incidental powers conferred upon it by statutes of that state.

We are brought, then, to consider more directly the question whether, in a case of this kind, where the court acted under statutory authority, jurisdiction should be presumed merely from the fact that the court assumed to exercise it. In *Galpin v. Page*, 18 Wall. 350, the court says: "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law": Page 367. A passage is quoted with approval from *Morse v. Presby*, 25 N. H. 299, 302, as follows: "The jurisdiction in such cases, both as to the subject matter of the judgment and as to the persons to be affected by it, must appear by the record; and every thing will be presumed to be without the jurisdiction, which does not distinctly appear to be within it." And a little further on the court adds: "Where the special powers conferred [by statute] are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record": Page 371. It is also said in *Sabariego v. Maverick*, 124 U. S. 261, that the presumption in favor of regularity of proceedings does not apply to give jurisdiction in proceedings not according to the common course of justice. In *Holmes v. Broughton*, 10 Wend. 75, 25 Am. Dec. 536, it was held that where a claim was founded upon a proceeding in Vermont ¹¹⁸ unknown to the common law, but authorized by a statute of that state, the statute must be set forth, so that the court might see that the proceedings were conformable thereto; and that a general averment that the proceedings were according to the laws of Vermont, and fully authorized thereby, was not enough; and that the court could not take judicial cognizance of laws of sister states at variance with the common law. This decision was cited with apparent approval in *Harris v. White*, 81 N. Y. 532, 544. In *Embury v. Conner*, 3 N. Y. 511, 523, 53 Am. Dec. 325, and in *Striker v. Kelly*, 7 Hill, 9, it was held that the supreme court

of New York exercised its powers under the New York street law as a court, but that as its powers in such matters were wholly derived from the statutes, and did not belong to it as a court of general jurisdiction, its decisions must be treated like those of a court of special and limited jurisdiction. A similar rule was applied in the surrogate's court to a decree of divorce granted by the proper court, but not shown to be within the conditions and limitations prescribed by the statutes: *Lawrence's case*, 18 Abb. Pr. 347. See also *Cullen v. Cullen*, 18 N. Y. St. Rep. 381. For an application of similar doctrine to different subjects, see *Morse v. Presby*, 25 N. H. 299, which is cited and approved in *Galpin v. Page*, 18 Wall. 371; *Bradley v. Jamison*, 46 Iowa, 68; *Louisville etc. Ry. Co. v. Parish*, 6 Ind. App. 89; *Furgeson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808; *Northcut v. Lemery*, 8 Or. 316; *Heatherly v. Hadley*, 4 Or. 1, 14; *Gray v. Larrimore*, 2 Abb. U. S. 542; *Belcher v. Chambers*, 53 Cal. 635; *Neff v. Pennoyer*, 3 Saw. 274, 299, 300; *Denning v. Corwin*, 11 Wend. 647. The rule is uniform in the case of inferior courts that their jurisdiction, when brought into question, must be clearly shown: *Thomas v. Robinson*, 3 Wend. 267; *Sheldon v. Hopkins*, 7 Wend. 435; *McLaughlin v. Nichols*, 13 Abb. Pr. 244.

The same rule prevails in Massachusetts. The decision in *Commonwealth v. Blood*, 97 Mass. 538, was placed solely upon this ground, the document produced being treated as if it were a record, though strictly speaking it was not entitled to be so treated; and it was held that the jurisdiction of a court of record in California over the subject of divorce is a special authority not recognized by the common law, and its powers ¹¹⁹ must be shown, and must appear to have been strictly pursued. A similar decision was made in respect to the jurisdiction of a court of record of another state to decree an absolute and final dissolution of a corporation at the suit of an individual, in *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 274, 96 Am. Dec. 747, and in respect to a question of the adoption of a child, in *Foster v. Waterman*, 124 Mass. 592. The rule on which these decisions rest is not peculiar to Massachusetts, but, as has been seen, it has a wide recognition elsewhere.

The proceedings which resulted in the judgment in the supreme court of New York in the case now before us were not in accordance with the course of the common law: 1 Bishop on Marriage, Divorce, and Separation, secs. 71, 128.

Jurisdiction to entertain them has not been shown. If the court had jurisdiction over the general subject, and if it should be assumed from the final order that an interlocutory order was actually passed for the payment of alimony *pendente lite*, it has not been shown that the court had authority to pass such order, or, at the conclusion of the suit, to order payment of arrears of such alimony, or to enter a judgment for such arrears, which should stand as a valid judgment enforceable in other courts. We do not know whether it would possess such authority in respect to alimony, even if it had jurisdiction over the general subject of the suit, or whether such a judgment for arrears of alimony could be enforced in New York by issue of an execution thereon, without further proceedings in court: *Knapp v. Knapp*, 134 Mass. 353. And see *Hoffman v. Hoffman*, 55 Barb. 269; *Galinger v. Galinger*, 4 Lans. 473. The jurisdiction in such cases is usually special, and the remedies special, and we are satisfied that this judgment depends for its validity upon statutes which are not before us, or upon usages or a course of practice with which we are not familiar, and we have not the means of knowing what faith and credit would be given to such a judgment in the courts of the state of New York: 1 Bishop on Marriage, Divorce, and Separation, sec. 128; *Allen v. Allen*, 100 Mass. 373. The justice of the superior court rightly refused to issue an execution upon the judgment for the amount of the alimony and counsel fees.

The judgment for costs of suit must rest on the same basis. The proceedings being special, the right to costs must depend ¹²⁰ upon the statutes, or upon the inferences to be drawn from them. In *Stevens v. Stevens*, 1 Met. 279, it was held, under our statutes then in force, that, where a husband voluntarily discontinued a libel against his wife for a divorce, she was entitled to a judgment and execution against him for costs. There was, however, an express statute providing that the court might hear and determine all matters relating to divorce, according to the course of proceedings in ecclesiastical courts and in courts of chancery: Rev. Stats., c. 76, sec. 38. The court was therefore authorized to allow costs, unless there was something in the relation of husband and wife to prevent, and the court held that there was not, and costs were allowed. The authority of the court of New York, in respect to costs in a proceeding like that before us, for

nullity of marriage, is not shown. We suppose it depends, directly or indirectly, upon the statutes, which have not been put in evidence: 2 Barbour's Chancery Practice, 2d ed., 250; 2 Bishop on Marriage and Divorce, 5th ed., sec. 366.

For these reasons, without considering other objections, the entry must be decree for the defendant.

MARRIAGE AND DIVORCE—AUTHORITY TO GRANT ALIMONY.—Independently of statutory authority equity has no authority to entertain a suit for alimony: *Fischli v. Fischli*, 1 Blackf. 360; 12 Am. Dec. 231, and note. The doctrine that equity has jurisdiction in such cases is supported by *Graves v. Graves*, 36 Iowa, 310; 14 Am. Rep. 525; *Rhame v. Rhame*, 1 McCord Eq. 197; 16 Am. Dec. 597, and note; *Fornhill v. Murray*, 1 Bland, 479; 18 Am. Dec. 344, and note; *Helms v. Franciscus*, 2 Bland, 544; 20 Am. Dec. 402. See, further, the extended note to *Methvin v. Methvin*, 60 Am. Dec. 666.

EVIDENCE.—STATUTES OF OTHER STATES must be pleaded and proven: *Hunt v. Johnson*, 44 N. Y. 27; 4 Am. Rep. 631; *Siegel v. Robinson*, 56 Pa. St. 19; 93 Am. Dec. 775, and note; *Brimhall v. Van Campen*, 8 Minn. 13; 82 Am. Dec. 118, and note; *Rape v. Heaton*, 9 Wis. 328; 76 Am. Dec. 269, and note. If the laws of another state are relied upon for the purpose of showing what faith and credit should be given to a judgment entered therein, they must be proved like other facts: *Osborn v. Blackburn*, 78 Wis. 209; 23 Am. St. Rep. 400, and note. Only common-law rights will be recognized by the courts of sister states: *Buckles v. Ellers*, 72 Ind. 220; 37 Am. Rep. 156. See, also, the extended note to *Ormes v. Dauchy*, 37 Am. Rep. 584.

MARRIAGE AND DIVORCE—EQUITY—POWER TO VACATE DECREE OBTAINED BY FRAUD.—A person against whom a decree of divorce has been obtained by fraud may maintain a suit in equity to have it annulled when the statutory proceedings do not afford adequate relief: *Smithson v. Smithson*, 37 Neb. 535; 40 Am. St. Rep. 504, and note, with the cases collected. See the extended note to *Greene v. Greene*, 61 Am. Dec. 459, and the note to *Brown v. Grove*, 9 Am. St. Rep. 826.

JUDGMENTS OF SISTER STATES—PRESUMPTION OF JURISDICTION.—In the absence of contradictory evidence there is a legal presumption in favor of the jurisdiction of a court of record of another state which has assumed jurisdiction over the subject matter in controversy between parties residing there: *Buffum v. Stimson*, 5 Allen, 591; 81 Am. Dec. 767, and note; *Shumway v. Stillman*, 4 Cow. 292; 15 Am. Dec. 374, and note; *Read v. Boyd*, 13 Tex. 241; 65 Am. Dec. 61, and note. See the extended note to *Hood v. State*, 26 Am. Rep. 28.

MARRIAGE AND DIVORCE—RIGHT TO INQUIRE INTO JURISDICTION OF THE COURT OF ANOTHER STATE TO GRANT DIVORCE.—The jurisdiction of a court of another state to render a judgment for costs and alimony may be inquired into by the courts of New York: *Rigney v. Rigney*, 127 N. Y. 408; 24 Am. St. Rep. 462. To the same effect see *In re James*, 99 Cal. 374; 37 Am. St. Rep. 60, and note. See the extended note to *Tolen v. Tolen*, 21 Am. Dec. 747.

DEWEY v. PEELER.

[161 MASSACHUSETTS, 125.]

AMENDMENT OF RECORD.—There can be no doubt of the general power of a court to amend its records or its process, so as to make them conform to the truth.

EXECUTION, AMENDMENT OF.—While an execution should follow the judgment, it is clear that an amendment may be allowed if the execution can be so identified with the judgment, and the record on which the judgment is founded, that the court can find *data* on which to make the amendment. Therefore, an execution in favor of D., as special administrator of the estate of B., may be amended so as to be in favor of D., administrator, with the will annexed, of the estate of B., if such amendment conforms it to the judgment on which it was issued.

AMENDMENT MAY BE MADE BY A COURT OF ITS RECORDS and process upon its own motion, or on the suggestion of any one, to conform them to the truth.

THE RECORD AND PROCESS OF A COURT MAY BE TREATED AS AMENDED, where, from inspection, the court can see that the error is merely a clerical one, whether it is a record of that court or not.

AMENDMENT OF RECORD.—A MOTION TO AMEND A RECORD OR PROCESS of the court may be made and granted in another cause in which such record is offered in evidence to sustain an action had or a sale made thereunder.

W. S. B. Hopkins, for the defendant.

T. G. Kent, for the plaintiff.

125 LATHROP, J. This is a writ of entry to recover possession of a parcel of land in Westminster. In a previous action brought by George T. Dewey, special administrator of the estate of Sarah Boyden, against Maria L. Peeler, the land in question had been attached as standing in the name of the tenant, having been fraudulently conveyed to him. During the pendency of the action against Maria L. Peeler Mr. Dewey was appointed administrator, with the will annexed, of the estate of Boyden, and was allowed to appear and prosecute the action. A verdict was returned in his favor, and a judgment was entered for him as administrator, with the will annexed, of the estate of Sarah Boyden. On this judgment execution issued to "George T. Dewey, special administrator of estate of Sarah Boyden." This execution was levied on the land in question by a deputy sheriff, and the land was sold to the demandant. The judgment, execution, officer's return, and sheriff's deed thereunder were put in evidence; and there was also evidence that the land was fraudulently conveyed to the tenant.

The tenant asked the judge, who tried the case without a jury, to rule that, on account of the variance between the judgment ¹³⁶ and the execution, the title did not pass to the demandant. The judge refused so to rule, and found that the variance was a clerical error of the clerk of the court, and might be amended. He also allowed an amendment, substituting in the execution the name of "George T. Dewey, administrator, with the will annexed," for the name "George T. Dewey, special administrator," so as to make the execution accord with the judgment. The motion for this amendment was entitled, "*George T. Dewey v. Durwald A. Peeler.*" The judge found for the demandant, and the tenant excepted to the refusal of the judge to rule as requested, to the allowance of the amendment, and to the finding for the demandant. Both the original action and the present action were brought in the superior court.

There can be no doubt of the general power of a court to amend its records or its processes, so as to make them conform to the truth: *Balch v. Shaw*, 7 Cush. 282; *Fay v. Wenzell*, 8 Cush. 315; *Parker v. Warren*, 2 Allen, 187; *Merrill v. Kaulback*, 158 Mass. 328; *Cawthorne v. Knight*, 11 Ala. 268. The result, therefore, is the same, whether an execution is considered as a part of the record in the case in which it is issued or as a separate process of the court.

While an execution should follow and conform to a judgment it is clear that an amendment may be allowed if the execution can be so identified with the judgment and the record on which that judgment is founded that the court can find data by which to make the amendment: *Bishop v. Hall*, cited in *Wells v. Dench*, 1 Mass. 232; *Currier v. Bartlett*, 122 Mass. 133; *Nims v. Spurr*, 138 Mass. 209; *Morse v. Dewey*, 3 N. H. 535; *Blake v. Blanchard*, 48 Me. 297; *Hayford v. Everett*, 68 Me. 505; *Corthell v. Egery*, 74 Me. 41; *Buswell v. Eaton*, 76 Me. 392; *Lewis v. Avery*, 8 Vt. 287; 30 Am. Dec. 469; *Whitehall Bank v. Pettes*, 13 Vt. 395; 37 Am. Dec. 600; *Bissell v. Kip*, 5 Johns. 89; *Jackson v. Anderson*, 4 Wend. 474; *Wright v. Nostrand*, 94 N. Y. 31, 47; *Rose v. Ingram*, 98 Ind. 276. In these cases amendments were allowed to make executions conform to judgments, or irregularities were treated as amended without a formal motion being made: See, also, Herman on Executions, sec. 66, et seq; 1 Freeman on Executions, secs. 63, 67, et seq.

In the case at bar the judge below found that the variance

in the execution was a clerical error of the clerk of the court. We ¹³⁷ have no power to revise his finding of fact; and it cannot be said that, on the record before him, he was not fully warranted in so finding.

We are not called upon in this case to determine how far an amendment can be made which affects injuriously the rights of third parties. The finding in this case was in favor of the demandant; and this shows that the tenant was not a *bona fide* purchaser of the land, but had no better title to the land than the defendant in the original action, as whose property it was attached and sold on execution to the demandant.

It is further objected that the amendment was made on a motion in the case at bar, and that it should have been made in the original action. To this there are two answers. Both actions were in the superior court for the same county. 1. It was in the power of that court to amend its records or its processes of its own motion, upon the motion or suggestion of any one, so as to make them conform to the truth: *Balch v. Shaw*, 7 Cush. 282. 2. Where, from an inspection of the record in a case, the court can see that the error is merely a clerical one, it may either, if the record is in that court, amend the error, or treat it as amended, whether the record is in that court or not: *Johnson v. Day*, 17 Pick. 106; *Worthy v. Warner*, 119 Mass. 550; *Currier v. Bartlett*, 122 Mass. 133; *Morse v. Dewey*, 3 N. H. 535; *Corthell v. Egery*, 74 Me. 41; *Lewis v. Arery*, 8 Vt. 287; 30 Am. Dec. 469; *Hayford v. Everett*, 68 Me. 505. There is also authority for the proposition that where an execution is not void, but voidable only, and therefore amendable, errors in it cannot be taken advantage of in a collateral action: *Bissell v. Kip*, 5 Johns. 89; *Hunt v. Loucks*, 38 Cal. 372; 99 Am. Dec. 404; *Wright v. Nostrand*, 94 N. Y. 31, 47, and cases cited. Without relying upon this proposition, we are of opinion that, for the other reasons stated, the order must be, exceptions overruled.

COURTS—POWER TO AMEND RECORDS.—A court has the power to amend its records so as to make them conform to the truth and facts of the case: *Frink v. Frink*, 43 N. H. 508; 80 Am. Dec. 189, and note; 82 Am. Dec. 172, and note; *In re Black*, 52 Kan. 64; 39 Am. St. Rep. 331, and note, with the cases collected; *Beam v. Bridgers*, 111 N. C. 269.

EXECUTIONS—AMENDMENTS OF.—An execution issued without the official seal may be amended by order of the court requiring the clerk to affix the seal: *Hall v. Lackmond*, 50 Ark. 113; 7 Am. St. Rep. 84. An execution cannot be amended after a sale under it, by the substitution of the true

Christian name of the defendant, as shown by the judgment, instead of one inserted by mistake, so as to validate the sale: *Morris v. Balkham*, 75 Tex. 111; 16 Am. St. Rep. 874. To the same effect see *McKay v. Paris Exchange Bank*, 75 Tex. 181; 16 Am. St. Rep. 884, and note.

LYNCH v. FORBES.

[161 MASSACHUSETTS, 302.]

EMINENT DOMAIN.—THE QUESTION WHETHER A NECESSITY EXISTS FOR THE TAKING of private property for the public use is a legislative, and not a judicial, one.

EMINENT DOMAIN, NECESSITY FOR TAKING, WHO MAY DETERMINE.—If the legislature has granted authority to a city or town to take any lands necessary for a designated public use a landowner is not entitled to have the necessity or expediency of the taking in any particular instance submitted to a jury. In the absence of any statute submitting the matter to a court or jury, the decision of the question lies with the body or individuals to whom the statute has delegated the authority to take.

MUNICIPAL AUTHORITY, DELEGATION OF.—If a municipality is given the right to exercise a certain authority in such manner and by such officers and agents as it shall from time to time choose, appoint, or direct, it can delegate the exercise of its powers to a board of officers.

THE plaintiff, Lynch, commenced an action of tort for trespass upon certain real property, and also a suit in equity to remove a cloud upon the title thereto. The defendant in justification offered evidence to the effect that he was the superintendent and engineer of the water-works of the town of Brookline, acting under the direction of the selectmen and water board of that town; that in performing his duties he entered upon the land in question; that such land had been taken by the town pursuant to a statute authorizing it to take land for the erection and maintenance of water-works. The plaintiff, to avoid the effect of the evidence offered by the defendant, sought to show that the town of Brookline had already taken certain tracts of land and erected water-works thereon, and had thus acquired all the land that was necessary or useful for the water-works of the town, and that the town had no occasion for taking or acquiring the same. The trial court, however, ruled that the question of whether the town had exceeded its authority by taking more land than was necessary, was not a question which the plaintiff was entitled to have submitted to a jury, and that, as the defendant had shown that the town had conformed to the

requirements of the various statutes as to the method of taking the land, the defendant's justification was complete, and therefore that the plaintiff could not recover.

G. F. Williams and G. W. Anderson, for the plaintiff.

C. A. Williams and M. Williams, for the defendants.

²⁰⁸ MORTON, J. The principal questions involved in these two cases are the same, and by agreement of parties they were argued and are to be considered together.

The plaintiff contends in both cases that the taking was unlawful, and at the trial of the case in trespass he offered to show that, prior to the taking in question, the town had taken all the land that it needed, and that this was not suitable and was not necessary, useful, or proper for any of the purposes named in the acts under which it was taken. The plaintiff concedes, what is well settled, that the question whether a necessity exists for the taking of private property for a public use is a legislative, and not a judicial, one. He does not deny that the taking of land for water-works and a water supply for the general benefit of the inhabitants of a city or town is a taking for a public use; but he contends that where, as here, the authority is given "to take . . . any lands or real estate necessary," etc., the question of the necessity, so far as it relates to the land actually taken, is one of fact, to be settled by the court or jury. Such has not been deemed to be the law in this state, though it is said in a work of established authority that the constitutions of some of the states require it to be done: *Talbot v. Hudson*, 16 Gray, 417; *Dorgan v. Boston*, 12 Allen, 223; *Eastern R. R. Co. v. Boston etc. R. R. Co.*, 111 Mass. 125; 15 Am. Rep. 13; *Lund v. New Bedford*, 121 Mass 286; Cooley's Constitutional Limitations, 5th ed., 538, note. There is no constitutional right on the part of the landowner in this state to have the question of the necessity or expediency of the taking in any particular instance submitted to a court or jury: *Holt v. Somerville*, 127 Mass. 408, 411. In the absence of any provision in the statutes submitting the matter to a court or jury, the decision of the question lies with the body or individuals to whom the state has delegated the authority to take. They have the same power as the state, acting through any regularly ²⁰⁹ constituted authority, would have: *Fall River Iron Works v. Old Colony etc. R. R. Co.*, 5 Allen, 221, 226; *People*

v. *Smith*, 21 N. Y. 595, 597; *Room Co. v. Patterson*, 98 U. S. 403, 406; *Stockton & Darlington Ry. Co. v. Brown*, 9 H. L. Cas. 246; *Lewis v. Weston-Super-Mare Local Board*, 40 Ch. Div. 55; Cooley's Constitutional Limitations, 5th ed., 538. See Lewis on Eminent Domain, sec. 238, note, for collection of cases. Of course, neither the state nor its delegates can take under the guise of eminent domain the property of A for the purpose of conveying it to B, or for a purpose clearly in excess of, or at variance with, the powers granted. No question of good faith, however, arises here, and the purpose for which the land was taken is within the scope of the acts authorizing it. The testimony that was offered was therefore rightly excluded, as was also that offered for the purpose of showing that the town was obtaining water from land taken in February, 1889, and that a part at least of the water thus taken did not come from the river by percolation. The validity of the taking now in question does not depend on the conduct of the town in regard to another and an earlier taking.

The plaintiff further contends that the formal requirements in relation to the taking were not complied with, and that the action of the selectmen and water board should have been ratified by the town. If it were necessary so to do, we well might rest our decision on the ground that the action of the town in defending these suits, and in seeking to avail itself of what the selectmen and water board had done, coupled with its entry upon and taking possession of the land, constituted a ratification of their acts: *Fisher v. Attleborough School Dist.*, 4 Cush. 494; *Kincaid v. Brunswick School Dist.*, 11 Me. 188. But we think all the formal requirements were complied with. The article in the warrant was "to appropriate money for land for the extension of our water supply, and to authorize the treasurer to borrow the same." By it the question of the extension of the water supply was brought before the voters anew, and the consideration of the article necessarily involved the question whether there should be any extension, and whether any additional land should be taken. Thereupon the town voted that "such land shall be purchased ^{or} taken for extension of the water supply of the town as the selectmen and water board for the time being shall decide to be for the best interests of the town." It was not necessary that the town should designate the specific land to be taken, or that it should formally ratify what

was done by the selectmen and water board. The Statutes of 1872, chapter 343, section 4, which was incorporated by reference into the Statutes of 1888, chapter 131, expressly provided that the town might exercise the "rights, powers, and authorities" given to it by the act "in such manner and by such commissions, officers, agents, and servants as said town shall, from time to time, choose, ordain, appoint, and direct." Under this provision the town properly could delegate the power of taking to the selectmen and water board: *Eastern R. R. Co. v. Boston etc. R. R. Co.*, 111 Mass. 125; 15 Am. Rep. 13; *Lund v. New Bedford*, 121 Mass. 286; *Lyon v. Jerome*, 26 Wend. 485; 37 Am. Dec. 271; *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258. The taking, when completed, by them became the act of the town. If there were any doubt before as to the power of the town to take from time to time, until the number of gallons specified and the amount of indebtedness authorized had been reached, the action of the legislature in passing the act of 1888 without imposing any additional restrictions, and increasing the quantity of water that might be taken, and the amount of indebtedness that might be incurred, would appear to have sanctioned the construction adopted by the town in regard to successive takings.

The plaintiff contends that by the demurrer the defendant admits that it had taken all the land that it was authorized to take before any of the last four takings; that none of the land included in the last four takings was necessary or proper for any of the purposes named in the acts, and that the plaintiff's land was not necessary or fit for any use for which the defendant was authorized to take and purchase land. The effect of the demurrer is to raise, more forcibly perhaps, the same question that was presented by the offer of proof in the case in trespass, namely, whether this court or any court can revise the action of the town authorities in taking the plaintiff's land. For reasons already given we are of opinion that it cannot. The averment that the town had ³¹¹ taken before the last four takings all the land that it was authorized to take is a conclusion of law, and not an allegation of fact, and has already been considered.

The result is, that in the first case the entry must be judgment on the verdict, and in the second, bill dismissed, with costs, and it is so ordered.

EMINENT DOMAIN—THE NECESSITY OF THE TAKING.—We are not confident that we understand the rule intended to be affirmed in the principal case. It is quite clear from the statement of facts that the plaintiff, whose land had been taken for an alleged public use, offered evidence tending to show that it was not necessary or useful for that use, and that the town which was authorized to acquire property for such use had already acquired the lands necessary to answer the use in question; that the evidence thus offered was excluded, and that, in sustaining the action of the trial court, it was said by the supreme judicial court that there is "no constitutional right on the part of the landowner in this state to have the question of the necessity or expediency of the taking in any particular instance submitted to a court or jury. In the absence of any provision of the statutes submitting the matter to a court or jury, the decision of the question lies with the body or individuals to whom the state has delegated the authority to take." The court, however, further described the power thus delegated to be "the same power as the state acting through any regularly constituted authority would have," and the court further declared that "neither the state nor its delegates can take under the guise of eminent domain the property of A for the purpose of conveying it to B, or for a purpose clearly in excess of, or at variance with, the powers granted." These two statements seem to us necessarily in conflict with each other, for if it be true that neither the state nor its delegates can take property for a purpose clearly in excess of, or at variance with, the powers granted them, it must further be true that a court, jury, or some other judicial or quasi-judicial tribunal must have authority to investigate the question, whether the attempted taking is in good faith, and whether the purpose for which the land is taken is within the scope of the acts authorizing such taking, but, if any tribunal had authority to examine this question, we can perceive no reason why the evidence offered and excluded in the trial court was not pertinent to the decision of the question, nor why, if the evidence offered was adequate to support a finding that no further lands were needed for the use in question, the judgment should not have been one denying the right to a further exercise of the power of eminent domain.

Public Use, What is, Whether a Legislative or a Judicial Question.—Decisions may be found asserting that what is a public use is a legislative question, and other decisions declaring with equal emphasis that this is a judicial question. But, as long as there is a constitutional provision denying the right to take lands for any other than a public use, it occurs to us that the question whether any particular use is a public one or not is ultimately, at least, a judicial question. The legislature may, it is true, in effect declare certain uses to be public, and, under the operation of the well-known rule that a statute will not be declared to be unconstitutional except in a case free, or comparatively free, from doubt, the courts will certainly sustain the action of the legislature, unless it appears that the particular use is clearly not of a public nature. The decisions must be understood with this limitation; for certainly no court of last resort will be willing to declare that any and every purpose which a legislature might happen to designate as a public use shall be conclusively held to be so, irrespective of the purpose in question and of its manifestly private character. This question has already been considered at length by us, and will therefore not receive further attention here: Note to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 691-707; *Scudder v. Trenton D. F. Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756; *Reddall v. Bryan*, 14 Md. 444; 74 Am. Dec. 550; *Olmstead v. Camp*, 33 Conn. 532;

69 Am. Dec. 221; *Pocantto W. Co. v. Bird*, 130 N. Y. 249; *Waterloo etc. Mfg. Co. v. Shanahan*, 128 N. Y. 345; *O'Hare v. Chicago etc. Ry.*, 139 Ill. 151; *Sherman v. Buick*, 32 Cal. 241; 91 Am. Dec. 577, and note.

It may happen that the property sought to be acquired under the exercise of the power of eminent domain is already appropriated to another public use. This is not conclusive against the right to further exercise the power of eminent domain with respect to such property, and the cases in which property already devoted to public use may, by compulsory proceedings, be taken for and devoted to another public use have also been considered in this series: Note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 137-147.

May the Necessity of the Taking be Disproved.—The question we shall now consider is this: Conceding the public use to have been properly declared, and the propriety of some exercise of the power of eminent domain in its behalf to be admitted, is the corporation or other body to which the legislature has delegated the right to exercise this power the sole judge of the extent of the property to be acquired, and may this body or corporation proceed to acquire property irrespective of the limits thereof, or may the person whose property is about to be taken answer that such property, or some part thereof, need not be taken, and that the purposes of the public use may fully be subserved without interfering with his property?

If the land sought to be taken is necessary for the use in question it is probably not a sufficient answer to the application that other lands or property might have been acquired by purchase equally beneficial to the purposes of the applicant: *Giesy v. Cincinnati etc. Ry.*, 4 Ohio St. 308.

The question we are considering, so far as it has been presented for decision, has not ordinarily called for any determination of doubtful questions of constitutional law. There are states, indeed, whose constitutions expressly require this question to be submitted to and determined by a jury: *People v. Village of Brighton*, 20 Mich. 57; *Powers' Appeal*, 29 Mich. 509. Where this is the case there can, however, be no doubtful question, for the mandate of the constitution must be obeyed. There are cases, too, which, in a general way, have spoken of the question as though it were a constitutional one, and that because there is no authority in the legislature, to take lands of a private person, except for a public use, he necessarily must have the right to a judicial determination as to the necessity of the taking in any particular instance: *Lecoul v. Police Jury*, 20 La. Ann. 308; *New Orleans etc. Ry. v. Gay*, 32 La. Ann. 471. Whether this be true or not, it is not necessary, in the absence of a constitutional or statutory provision to that effect, to submit the question to the determination of a jury. It may doubtless be referred for a decision to a court, or to commissioners appointed for that purpose by the court, and acting under its supervision and subject to its control: *Heyneman v. Blake*, 19 Cal. 579, 597. There are other decisions in which, though the question was not necessarily involved, it has been assumed that the legislature might in the first instance have determined the property necessary to the public use by designating the particular premises to be taken, and that, where such designation has been made, the courts have no power to annul or to revise it: *Rensselaer etc. Ry. v. Davis*, 43 N. Y. 144. The legislature has, however, very rarely undertaken to designate the precise property which should be taken for any public use, but has generally, as in the statute under consideration in the principal case, merely conferred authority to take for the public use the lands or real estate necessary therefor. Under statutes of this character the courts, so far as we are aware,

with the single exception of those in Massachusetts, have regarded the allegation of a necessity for the taking as an issuable one, which it was not competent for the plaintiff, or person, or corporation seeking the condemnation to determine, and have permitted the person whose property was to be taken to litigate this question, and to defeat the proposed appropriation so far as it appeared to be unnecessary. There are doubtless many instances in which it may be exceedingly difficult to determine whether or not the whole of the property sought to be acquired is necessary for the use for which it is sought to be taken, and perhaps in these cases the courts may hesitate to overrule the judgment of the corporation or other body authorized to acquire property for the public use. Whether this be true or not, it is affirmed by an almost overwhelming preponderance of the authorities that the rule apparently asserted in the principal case cannot be sustained, and that, where the legislature has only authorized the taking of such property as is necessary, the question of the necessity for taking is a judicial one which must be determined either by a court, jury, or some quasi-judicial tribunal designated in the statute: *Lewis on Eminent Domain*, secs. 238, 393; *O'Hare v. Chicago etc. Ry.*, 139 Ill. 151, 161; *Cooley's Constitutional Limitations*, 6th ed., 664; *In re St. Paul etc. Ry.*, 34 Minn. 227; *Olmsted v. Proprietors*, 46 N. J. L. 495; *Rensselaer, etc. Ry. v. Davis*, 43 N. Y. 137; *Matter of New York Central R. R. Co.*, 66 N. Y. 407; *Spring Valley Water Works v. San Mateo Water Works*, 64 Cal. 123; *Reed v. Louisville B. Co.*, 8 Bush. 69; *Tracy v. Elizabethtown etc. Ry. Co.*, 80 Ky. 259; *Heyneman v. Blake*, 19 Cal. 579; *Baltimore etc. Ry. v. P. W. & K. R. R. Co.*, 17 W. Va. 812, 843; *Railroad Co. v. Blake*, 9 Rich. 228; *Carolina etc. Ry. v. Love*, 81 N. C. 434; *McWhirter v. Cockrell*, 2 Head, 9; *Wisconsin etc. R. R. Co. v. Cornell University*, 52 Wis. 537.

WHEELER v. HANSON.

[161 MASSACHUSETTS, 370.]

MISTAKE IN MIDDLE INITIAL.—If a complaint charges Charles F. with the commission of a crime, and the subsequent proceedings purport to be against Charles P., evidence is properly received to show that there was but one complaint, and that the subsequent use of the name Charles P. was but a mere clerical error. The admission of such evidence does not violate the rule that a record cannot be impeached or contradicted.

MALICIOUS PROSECUTION, DAMAGES, COUNSEL FEES, AND COSTS OF SURETIES.—In an action for malicious prosecution plaintiff may be permitted to prove that he necessarily paid sureties to go upon his bond, and that he paid counsel fees. Both these expenses are direct and necessary results of the prosecution, and constitute part of the damages to which plaintiff was subjected in consequence thereof.

MALICIOUS PROSECUTION—DAMAGES.—In an action by a watchmaker against his former employer for malicious prosecution on a charge of embezzlement plaintiff should be permitted to show the nature of his business, and the tools required in it, the subsequent difficulty he had in procuring employment, the trouble to which he was subjected by taking away the property on which he relied to obtain other tools, the amount of his earnings, the injury to his feelings and reputation, and indignity

he suffered, because the natural and necessary result of the charge made against plaintiff would be to render it more difficult for him to obtain employment, and to impair his credit and affect his reputation, as well as to injure his feelings and subject him to indignity.

MALICIOUS PROSECUTION—EVIDENCE IN DEFENSE.—One who charges his employee with embezzling goods from a store will not, on a trial of a civil action for malicious prosecution, be permitted to prove that the plaintiff, being authorized to exchange such goods, exchanged them for land at a price greatly above its real value, though an agreement had been made by plaintiff for their exchange, such goods still remaining in the store at the time the prosecution was instituted.

MALICIOUS PROSECUTION.—DAMAGES ACCRUING FROM A MALICIOUS PROSECUTION AFTER THE COMMENCEMENT OF A CIVIL ACTION are recoverable therein, because there can be but one assessment of damages for such a cause of action.

MALICIOUS PROSECUTION.—The fact that the person accused makes a motion to dismiss the prosecution cannot be considered as an admission of guilt on his part, nor as showing that his accuser had probable cause to believe him guilty. Therefore, in a trial of a civil action for malicious prosecution, the defendant will not be permitted to argue to the jury as to the effect of such motion.

TORT for maliciously prosecuting the plaintiff of a charge of embezzlement. A complaint was filed against him, properly designating him as Charles F. Wheeler, but in all subsequent proceedings the name Charles P. Wheeler appeared, and at the trial evidence was received, against defendant's objection, tending to prove that plaintiff was the person intended in all the proceedings, and that, in failing to find an indictment against Charles P. Wheeler, the prosecution against plaintiff by the name of Charles F. Wheeler had terminated in his favor. The plaintiff, who was a watchmaker, worked for the defendant in the jewelry-store of the latter under an agreement by which he, instead of receiving wages, was entitled upon all sales made by him to the difference between the prices at which they were effected and the prices of the goods sold as entered in duplicate upon certain books. The plaintiff was also authorized by his employer to sell in plaintiff's name the whole business in his own name, if he could procure a purchaser, for the sum of one thousand dollars. Plaintiff entered into an agreement with one Smith to exchange the store for certain real property, giving Smith an option within one month to pay the one thousand dollars and receive a reconveyance of the realty. The defendant was notified of the negotiations of the exchange, and assented thereto. Smith executed a conveyance of his property, which was delivered to plaintiff and placed on rec-

ord, and then plaintiff placed Smith in possession of the store and property. The goods remained in the store when defendant filed a complaint charging plaintiff with their embezzlement. Plaintiff, against the defendant's objection, was allowed to prove that he was compelled to pay fifty dollars to sureties to go upon his recognizance, and a like sum to counsel to conduct his defense; that after the hearing of the cause against him he tried to purchase on credit tools necessary to carry on his trade, but was refused because of the charge made against him; that a search warrant issued against him at the instance of the defendant, under which certain jewelry was taken from his possession to which he was entitled as an offset to the value of certain tools which had been included in the bill of sale to Smith by the consent of the defendant; that before his arrest plaintiff had been earning from eighteen dollars to twenty dollars per week, and afterwards could not secure employment by which he could earn more than from twelve dollars to sixteen dollars and fifty cents for a like period. In defense, evidence was offered tending to prove that the land taken in exchange was of little value, but this, on the objection of the plaintiff, was excluded. The plaintiff had filed a motion during the progress of the prosecution against him for its dismissal, and when the attorney for the defendant was arguing to the jury that this tended to show an unwillingness on the part of the plaintiff to meet the charge on the merits, the judge refused to permit that line of argument, and the defendant excepted. Verdict for the plaintiff.

S. H. Tyng, for the defendant.

J. K. Berry, E. R. Anderson, and E. C. Upton, for the plaintiff.

375 MORTON, J. The first objection by the defendant to the admission of evidence did not result in an exception, and need not therefore be considered.

We discover no error in regard to the admission of evidence to show that the prosecution had terminated. The substitution of the letter P for the letter F as the initial of the plaintiff's middle name was wholly a clerical mistake, and the plaintiff was properly allowed to show that fact and that he was the person meant: *Wood v. Le Baron*, 8 Cush. 471. In an action against the plaintiff's sureties on his recognizance it could have been shown that the mistake in his

name was a purely clerical ³⁷⁶ error: *Wood v. Le Baron*, 8 Cush. 471. The principle that a record cannot be impeached or contradicted has no application to a case like the present, where it is evident from one part of the proceedings that a clerical mistake has occurred in another part of the proceedings: *Eastman v. Perkins*, 10 Cush. 249; *Commonwealth v. McMahon*, 133 Mass. 394; *Commonwealth v. Brigham*, 147 Mass. 414, 416.

The evidence as to what the plaintiff paid the sureties to go upon his bond, and what he paid for counsel fees, was properly admitted. If it was objected to on the ground that there was no allegation of special damage in the declaration, that objection should have been called to the attention of the court at the trial, and was not.

The expenses to which the plaintiff was put in procuring sureties and in employing counsel were the direct and necessary result of the defendant's act, and constituted a part of the damages to which the plaintiff was subjected in consequence thereof: *Savile v. Roberts*, 1 Ld. Raym. 374; *Foxall v. Barnett*, 2 El. & B. 928; *Sheldon v. Carpenter*, 4 N. Y. 579; 55 Am. Dec. 301; *Marshall v. Betner*, 17 Ala. 832; *Lawrence v. Hagerman*, 56 Ill. 68, 75; 8 Am. Rep. 674; *Magmer v. Renk*, 65 Wis. 364; *Walker v. Pittman*, 108 Ind. 341; *Blunk v. Atchison etc. R. R. Co.*, 38 Fed. Rep. 311, 317; 2 Greenleaf on Evidence, sec. 456. It has been held more than once in this State that when the plaintiff has, in consequence of the wrongful conduct of the defendant, been put to expense in the employment of counsel, the amount so paid is an element of damage in an action against the defendant arising out of such wrongful conduct: *Pond v. Harris*, 113 Mass. 114, 121; *New Haven etc. Co. v. Hayden*, 117 Mass. 433; *Westfield v. Mayo*, 122 Mass. 100; 23 Am. Rep. 292; *Faneuil Hall Ins. Co. v. Liverpool etc. Ins. Co.*, 153 Mass. 63, 72. See, also, *Boston etc. R. R. Co. v. Charlton*, 161 Mass. 32, and *Conant v. Burnham*, 133 Mass. 503, 505; 43 Am. Rep. 532.

We also think that it was competent for the plaintiff to show the nature of his business and the tools required in it, the difficulty which he had in getting employment, the trouble to which he was subjected by taking away the property on which he relied to obtain other tools, the amount of his earnings, the injury to his feelings and reputation, and the indignity which ³⁷⁷ he suffered: *Hunter v. Farren*, 127 Mass. 481; 34 Am. Rep. 423; *Morgan v. Curley*, 142 Mass. 107; *French*

v. *Connecticut River Lumber Co.*, 145 Mass. 281; *Leach v. Wilbur*, 9 Allen, 212. *Tompson v. Mussey*, 3 Me. 305; *Ehrgott v. Mayor etc.*, 96 N. Y. 264; 48 Am. Rep. 622; Sedgwick on Damages, 8th ed., sec. 133.

The natural and necessary results of the charge which the defendant made against the plaintiff and of his action thereon would be, as they became known, to render it more difficult for him to obtain employment, and to impair his credit and to affect his reputation, besides injuring his feelings and subjecting him to indignity.

The prosecution instituted by the defendant against the plaintiff was for the embezzlement of goods from the store. Evidence that the land taken by the plaintiff in exchange for the store was taken at a price greatly above its real value would have no tendency to show that the defendant had probable cause for believing that the plaintiff had embezzled the goods, and was not admissible in mitigation of damages: *Bliss v. Franklin*, 13 Allen, 244. It was therefore properly excluded.

There can be but one assessment of damages for the cause of action on which this suit is based, and all the damages, those accruing after as well as before the bringing of the action, must be included in it. Evidence as to damages after the date of the writ was therefore rightly admitted: *Fay v. Guynon*, 131 Mass. 31. The case is not like that of a continuing trespass; for instance, where new causes of action arise from day to day, or a case in which there may be successive breaches of the same contract.

The court properly refused to allow the defendant to argue to the jury as to the effect of the motion to dismiss filed by the plaintiff in the municipal court. The plaintiff had a right to make the motion, and it cannot be considered in any sense as an admission of guilt on his part, or as showing that the defendant had probable cause to believe him guilty.

The result is that the exceptions must be overruled, and it is so ordered.

MALICIOUS PROSECUTION OF CRIMINAL ACTION—ELEMENTS OF DAMAGES. COUNSEL FEES, INJURY TO BUSINESS AND REPUTATION: See the extended note to *Ross v. Hixon*, 26 Am. St. Rep. 162-164.

WARDWELL v. HALE.

[161 MASSACHUSETTS, 396.]

WILLS. — A BEQUEST TO A SON OF A SUM OF MONEY TO BE PAID TO HIM WHEN HE SHALL REACH THE AGE OF THIRTY YEARS, without any provision for the disposition of the money if he should not reach that age, vests the money in him absolutely, but postpones the time when he may receive it, and, in the event of his death before reaching the age, his administrator may maintain an action for the legacy at any time after which the son would have been entitled to it had he survived.

H. G. Nichols and C. K. Cobb, for the defendants.

F. L. Washburn, for the plaintiff.

397 FIELD, C. J. The seventh article of the will of Ezekiel J. M. Hale is as follows: "I give to my son, Edward Hale, the **398** sum of ten thousand dollars (\$10,000), to be paid to him at my decease, if he shall then have arrived at the age of twenty-one years; if he shall not then be twenty-one years old, the same to be paid to him when he shall attain that age. I also give to him the sum of twenty thousand dollars (\$20,000), to be paid to him when he shall attain the age of twenty-five years, together with the further sum of twenty thousand dollars (\$20,000), to be paid to him when he shall attain the age of thirty years. Also, I give to him the annuity of thirty-six hundred dollars (\$3,600), to be paid to him in monthly payments during his life, and at his decease I give to his wife and children, if he shall leave a wife or child alive, the annuity of twenty-four hundred dollars (\$2,400), to be paid to them, or either of them, until the final division of the rest and residue of my estate as hereinafter provided. *Provided, however*, if the wife of my said son shall remarry, her interest in said annuity shall at once and forever cease."

The gift of the foregoing legacies to Edward Hale, except the annuity, is in terms absolute, but the time of payment is postponed until the legatee reaches the ages mentioned. The ten thousand dollars is "to be paid to him at my decease, if he shall then have arrived at the age of twenty-one years; if he shall not then be twenty-one years old, the same to be paid to him when he shall attain that age." The twenty thousand dollars is "to be paid to him when he shall attain the age of twenty-five years," and the further sum of twenty thousand dollars is "to be paid to him when he shall attain the age of thirty years." It seems impossible to distinguish between these legacies, and to hold that the first vested on

the death of the testator, and that the last two did not. There is no specific gift over in case Edward Hale dies before attaining the age of twenty-one years, or of twenty-five years, or of thirty years, although there is a gift of the residue by the twenty-second article, which provides as follows: "As to the residue and remainder of all my estate, both real and personal, not herein otherwise disposed of, it is my will that the same be and remain in the care and control of my said executrix and executors and trustees, and their successors, well and safely invested, until the decease of the last survivor of the life annuitants named in my foregoing will, and that then the said residue and ~~and~~ remainder, with all the accumulated interest thereof, shall be equally divided among my grandchildren *per stirpes*, to hold to such grandchildren so distributed, and to their heirs, executors, administrators, and assigns forever."

The only probable reason for postponing the payment of the legacies to Edward Hale is, that, before he should reach the age of twenty-one years, a guardian might be necessary, and that, after he reached that age, he might be less competent to manage his property at the age of twenty-one years than at the age of twenty-five or of thirty years.

The first clause of the fifth article of the will is as follows: "I give to my son, Harry H. Hale, the sum of fifty thousand dollars (\$50,000), to be paid to him at my decease; and if he shall survive me for the period of five years, but not otherwise, I direct my executrix and executors and trustees, at the expiration of five years from my death, to pay to him the further sum of fifty thousand dollars (\$50,000); but if he shall not live five years after my death, the sum of fifty thousand dollars is to remain a part of my estate." This shows that the testator knew how to use apt words when he intended that a pecuniary legacy should be contingent until the legatee reached the age when it was to be paid to him.

In other articles of the will the testator gives pecuniary legacies to be paid to other legatees when they reach a certain age, and he uses substantially the same language as in the seventh article.

The weight of authority is, we think, that the legacies to Edward Hale of ten thousand dollars, twenty thousand dollars, and twenty thousand dollars vested in him on the death of the testator, and that only the time of payment was postponed until he should reach the ages respectively prescribed:

Shattuck v. Stedman, 2 Pick. 468; *Furness v. Fox*, 1 Cush. 134; 48 Am. Dec. 593; *Eldridge v. Eldridge*, 9 Cush. 516, 519. See *Clafin v. Clafin*, 149 Mass. 19, 22; 14 Am. St. Rep. 393; 1 Jarman on Wills, Bigelow's edition, 794. We are of opinion that the ruling of the superior court was right.

Judgment for the plaintiff affirmed.

LEGACIES DEFERRING TIME OF PAYMENT WHETHER VESTED. — Where a testator directed that a certain sum should be invested out of his estate, the income to be applied to the support of a nephew until he became of age, and, in case he lived to that age, he was to get the principal, and where there was no bequest over, the legacy to the nephew was a vested one, and upon his death, before becoming of age, passed to his heirs: *Robert's Appeal*, 59 Pa. St. 70; 98 Am. Dec. 312, and note. A legacy is vested if the time of payment is merely postponed, and it appears to be the testator's intention that his bounty shall immediately attach: *Furness v. Fox*, 1 Cush. 134; 48 Am. Dec. 593, and note; *Goebel v. Wolf*, 113 N. Y. 405; 10 Am. St. Rep. 464, and extended note.

DONAHUE v. PARKMAN.

[161 MASSACHUSETTS, 412.]

FORFEITURE.—A contract is not unreasonable which stipulates that a sum paid by a purchaser of real property shall be forfeited to the use of the seller on the failure of the former to comply with the residue of the terms of sale.

VENDOR AND PURCHASER—FORFEITURE OF PARTIAL PAYMENT.—One who purchases real property and makes a deposit of money under an agreement that it shall be forfeited if he fails to comply with the terms of the sale cannot recover it if the sale is not completed through his fault.

C. F. Eldredge, for the plaintiff.

C. C. Read, for the defendant.

413 LATHROP, J. By the terms of the sale, which was for cash, five hundred dollars were to be "paid at sale into the hands of the auctioneer, to be forfeited to the use of the seller in case the purchaser shall fail to comply with the residue of the terms of the sale, a forfeiture of said sum not to release the purchaser from his liability under this contract; the balance of the amount to be paid, and settlement to be made, and deed to be delivered at the office of the auctioneers at or before 2 o'clock P. M., on Tuesday, the third day of January, A. D. 1893."

The paper signed by the purchaser, the plaintiff in this action, acknowledged the purchase of the estate for thirteen thousand dollars, and proceeded as follows: "And I hereby

agree to comply with the terms of the sale as stated by the auctioneer and hereto annexed; and having paid into the hands of the auctioneer the sum of five hundred dollars, agreeably to said terms of sale, I ⁴¹⁸ hereby agree to forfeit said sum to the use of the seller should I fail to comply with the residue of said terms."

It is not contended that there was any thing unreasonable in the terms of the sale; and it could not be so said as matter of law: *Model Lodging-House Assn. v. Boston*, 114 Mass. 133; *Pope v. Burrage*, 115 Mass. 282; *Wing v. Hayford*, 124 Mass. 249.

The justice, who tried the case without a jury, having found for the defendant, it must be assumed that the fact that the sale was not carried out was the fault of the plaintiff.

The first and principal question is whether a purchaser at a sale by auction, who has made a deposit of money under an agreement that it shall be forfeited to the use of the seller if he fails to comply with the terms of the sale, can recover back the deposit. It is well settled that he cannot.

If the contract had contained the words that the deposit was "to bind the bargain," the case at bar would be governed by that of *Thompson v. Kelly*, 101 Mass. 291, 299, 3 Am. Rep. 353, where it was held that, if the purchaser did not make the deposit and refused to comply with the terms of the sale, an action would lie against him for the deposit, although the property was afterwards sold for more than it brought at the first sale.

Sometimes the deposit is called "an earnest" in the agreement, and then it is clear that it cannot be recovered back: *Hinton v. Sparkes*, L. R. 3 C. P. 161; *Catton v. Bennett*, 51 L. T., N. S., 70. See, also, *Sage v. Central R. R. Co.*, 99 U. S. 334, 344, where a decree of foreclosure by sale of the property of a railroad corporation, which provided that a purchaser should be required to pay at once a part of his bid, as "earnest money," was approved by the court.

It is held in other cases that, even if there is no clause of forfeiture in the agreement, a purchaser who violates his contract cannot recover the deposit: *Ex parte Barrell*, L. R. 10 Ch. 512; *Depree v. Bedborough*, 4 Giff. 479; *Howe v. Smith*, 27 Ch. Div. 89.

Where the agreement contains a clause of forfeiture the authorities generally agree that the deposit cannot be recovered back. In *Thompson v. Kelly*, 101 Mass. 299, 3 Am. Rep.

353, it is said by Mr. Justice Ames: "When a purchaser expressly stipulates that a payment on account, ⁴¹⁴ actually made by him, is to be forfeited if by his own fault the purchase shall not go into effect, he may reasonably be understood to mean that it shall not be reclaimed in whole or in part. The distinction between a penalty and liquidated damages does not apply to a case of that description." So, in *Howe v. Smith*, 27 Ch. Div. 89, the deposit is said by Lord Justice Fry to be not merely a part payment, but "an earnest to bind the bargain." To the same effect is *Soper v. Arnold*, 35 Ch. Div. 384: See, also, *Cooper v. London etc. Ry. Co.*, 4 Ex. 88; *Thomas v. Brown*, 1 Q. B. Div. 714; *Best v. Hammond*, 12 Ch. Div. 1.

In other cases a deposit with an agreement for forfeiture is treated as liquidated damages: *Lea v. Whitaker*, L. R. 8 C. P. 70; *Essex v. Daniell*, L. R. 10 C. P. 538; *Mathews v. Sharp*, 99 Pa. St. 560; *Tingley v. Cutler*, 7 Conn. 291.

The fact that the sale by the defendant was made by him as mortgagee does not give the plaintiff any additional rights, considering him simply as a purchaser. Nor do we see that the fact that he participated in the scheme of Alfred A. Marcus to delay the foreclosure of the mortgage by pretending to buy the property gives him any better standing in court.

⁴¹⁵ We have no occasion to consider what the rights of the owner of the equity of redemption would be, in a bill brought to redeem the mortgage, to a deposit received by the mortgagee from a purchaser who had failed to carry out his agreement. No such question arises here.

The rulings requested by the plaintiff were therefore properly refused, and the order must be exceptions overruled.

VENDOR AND PURCHASER—FORFEITURE OF PARTIAL PAYMENT BY VENDEE.—A purchaser of land under a contract for the sale thereof, who repudiates the contract and refuses to fulfill, is not entitled to recover an installment of purchase money previously paid by him, if the vendor is willing and offers to perform his part, notwithstanding the contract is within the statute of frauds: *McKinney v. Harvie*, 38 Minn. 18; 8 Am. St. Rep. 640, and note; *Coughlin v. Knowles*, 7 Met. 57; 39 Am. Dec. 759, and note; *Sims v. Hutchins*, 8 Smedes & M. 328; 47 Am. Dec. 90; *Cobb v. Hall*, 29 Vt. 510; 70 Am. Dec. 432, and note; *Galway v. Shields*, 66 Mo. 313; 27 Am. Rep. 351, and note; *Day v. Wilson*, 83 Ind. 463; 43 Am. Rep. 76; but see *Scott v. Bush*, 26 Mich. 418; 12 Am. Rep. 311. A contract for a sale, stipulating that, in the event of the vendee's failure to pay the balance of the purchase price, the amount paid by him shall be regarded as liquidated dam-

ages for his breach of the contract and retained by the vendor, is void so far as it undertakes to fix such damages, and the vendee may therefore recover the amount paid by him, less the actual damages resulting from his noncompliance with his contract: *Drew v. Pedlar*, 87 Cal. 443; 22 Am. St. Rep. 257, and note; *Phelps v. Brown*, 95 Cal. 572.

ROTHROCK v. DWELLING-HOUSE INSURANCE CO.

[161 MASSACHUSETTS, 422.]

**A CORPORATION DOING BUSINESS IN A FOREIGN STATE THEREBY SUB-
JECTS ITSELF to the statutes of that state.**

CORPORATION DOING BUSINESS IN A FOREIGN STATE—JURISDICTION OF.—

If the statutes of a state declare that no foreign insurance company shall do business therein unless it files a stipulation agreeing that process affecting it may be served in a designated manner, and that any corporation or person transacting business without complying with the provisions of the statute shall forfeit certain sums to the school fund, a corporation doing business without complying with the statute does not thereby subject itself to the jurisdiction of the courts of the state, and a judgment against it founded upon service of process on the officer named in the statute is void. The business done is unlawful, and the persons doing it are liable to the penalty imposed by the statute, but the corporation is not brought within the jurisdiction of the courts of the state in the manner in which it would have subjected itself to such jurisdiction had it complied with the statute.

H. Wheeler, for the defendant.

F. B. Hemenway, for the plaintiff.

422 KNOWLTON, J. It appears by the agreed facts that the judgment on which this action is brought was rendered in Arkansas without service of process on the defendant, and that the defendant had no notice or knowledge of the suit until long afterwards. The defendant was incorporated in Massachusetts, and had no place of business in Arkansas, except as certain **424** persons solicited insurance for it there and sent the applications to the office of the defendant in Chicago, Illinois, where policies were issued.

In an action upon a foreign judgment it is proper to inquire into the jurisdiction of the court in which the judgment was rendered to ascertain whether the defendant appeared, and, if not, whether legal service was made upon him: *Gilman v. Gilman*, 126 Mass. 26; 30 Am. Rep. 646; *Wright v. Andrews*, 130 Mass. 149. In the present case service was made in the original action on the auditor of the state of Arkansas, and the only question is whether such service was authorized,

and was sufficient under the statute of that state. The language of the statute is as follows:

"Sec. 3834. No insurance company, not of this state, nor its agents, shall do business in this state, until it has filed with the auditor of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the auditor or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this state. And if such company should cease to maintain such agent in this state, so designated, such process may thereafter be served on the auditor; but, so long as any liability of the stipulating company to any resident of this state continues, such stipulation cannot be revoked or modified: except that a new one may be substituted, so as to require or dispense with service at the office of said company within this state, and that such service, according to this stipulation, shall be sufficient personal service on the company. The term 'process' includes any writ, summons, subpoena, or order, whereby any action, suit, or proceedings shall be commenced, or which shall be issued in or upon any action, suit, or proceedings.

"Sec. 3835. Any person or persons, or corporation, receiving premiums or forwarding applications, or in any other way transacting business for any insurance company or association not of this state, without having received authority agreeably to the provisions of this act, shall forfeit and pay to the school fund of the state the sum of five hundred dollars for each month or fraction ⁴²⁵ thereof during which such illegal business was transacted, and any company not of this state, doing business without authority, shall forfeit a like sum for every month or fraction thereof, and be prohibited from doing business in this state until such fines are fully paid": Stats. of Arkansas of 1884.

The defendant had filed no stipulation as required by this statute. The persons forwarding applications, and the corporation itself, were therefore liable to fines, and the corporation was also prohibited from doing business until the fines should be paid. There is no provision for service on the auditor when no stipulation is filed, and in such cases the policy holders are left to pursue their remedies on their policies in jurisdictions where they can get a valid service, while

the corporation and its agents are punished for their violation of law. In section 3835 business done without filing the stipulation is called illegal, and we see nothing to indicate that the object of the statute is to make the business regular, or to authorize a service upon the auditor when no stipulation is filed. We do not consider the decision of the county court in Arkansas in the original action an exposition of the statute which is authoritative and binding upon us, and we are not inclined to follow the case of *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471, 1 McCrary, 128, in which it is held that the defendant was estopped to deny the jurisdiction. That case differed from this inasmuch as the defendant there had notice of the suit, and appeared and sought to set up a want of jurisdiction, although perhaps this difference is not very material. We do not doubt the doctrine that a corporation doing business in a foreign state thereby subjects itself to the statutes of that state: *Reyer v. Odd Fellows' etc. Assn.*, 157 Mass. 367; 34 Am. St. Rep. 288; *Lafayette Ins. Co. v. French*, 18 How. 404, 408; *Railroad Co. v. Harris*, 12 Wall. 65, 81. But it seems to us that the question before us is not whether the defendant would be estopped from setting up its failure to comply with the law to relieve itself from liability under its contract, but whether the plaintiff presents a case which comes within the terms of the statute on which the jurisdiction of the court must be founded. Unless the statute applies to a case like this, the service was improperly made, and it is as if there had been no service. In our opinion, unless the stipulation is filed, a foreign insurance company ⁴²⁶ has no right to do business in the state, and, if it violates the law in that respect, no service can be made upon the auditor, and no jurisdiction can be obtained there on which to found a judgment against it. The remedy provided is by a punishment of the corporation, and of such others as have disregarded the requirements of the statute. Suits may be brought upon the contracts in any state where jurisdiction can be obtained: *Hartford Livestock Ins. Co. v. Matthews*, 102 Mass. 221; *Lamb v. Bowser*, 7 Biss. 815, 372; *Union etc. Ins. Co. v. McMillen*, 24 Ohio St. 67.

Judgment for the defendant.

CORPORATIONS, FOREIGN—REGULATION OF.—The power of a corporation to do business in a foreign country or another state depends upon the law of the country of its creation, and on the law of the place where it assumes to act: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep.

194, and note. Every power which a corporation exercises in a state other than that in which it was organized depends for its validity upon the laws of that state: *Phoenix Ins. Co. v. Commonwealth*, 5 Bush, 68; 96 Am. Dec. 331, and extended note at page 341. A foreign corporation is recognized in a foreign jurisdiction not as an act of right, but as an act of grace; and a state may refuse to recognize a foreign corporation except upon its own conditions: *Erie Ry. Co. v. State*, 31 N. J. L. 531; 86 Am. Dec. 226, and note; *Commonwealth v. Milton*, 12 B. Mon. 212; 54 Am. Dec. 522, and note. See, further, the notes to *Deringer v. Deringer*, 1 Am. St. Rep. 160, and *State v. Goodwill*, 25 Am. St. Rep. 873.

FOREIGN CORPORATIONS—FAILURE TO COMPLY WITH LAW—VALIDITY OF CONTRACTS.—The contract of a foreign corporation which has not complied with the statute of this state authorizing it to do business here is nevertheless valid, and may be enforced by it if the statute, after declaring what nonresident corporations should do before transacting business in the state, makes the doing of business without complying with the law a misdemeanor punishable by fine: *Toledo Tie etc. Co. v. Thomas*, 83 W. Va. 566; 25 Am. St. Rep. 925, and note. To the same effect, *Sherwood v. Alvis*, 83 Ala. 115; 3 Am. St. Rep. 695, and note; *Edison etc. Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370; 40 Am. St. Rep. 910, and note. See the note to *Dudley v. Collier*, 13 Am. St. Rep. 60.

FOREIGN CORPORATIONS.—JURISDICTION: See the note to *Reyer v. Odd Fellows' etc. Assn.*, 34 Am. St. Rep. 293.

KALLECK v. DEERING.

[161 MASSACHUSETTS, 469.]

MASTER AND SERVANT—VESSELS.—The mate of a vessel and a seaman are fellow-servants, and the latter, therefore, cannot recover of the owners for an injury received while using an implement which he was directed to use by such mate, who was guilty of negligence in constructing the implement, and in ordering the seaman to use it.

C. T. Russell, Jr., for the defendants.

J. M. Browne, for the plaintiff.

469 HOLMES, J. This is an action of tort for personal injuries suffered on board a coasting vessel while in harbor, through the breaking of a triangle on which the plaintiff was sitting and scraping a mast. As the case comes before us we must take it that the defendants did their duty in furnishing materials for the construction of the triangle, that the mate was in control of the vessel at the time, and that the cause of the plaintiff's injury was some negligence on the mate's part in constructing the triangle, and in ordering the plaintiff to use it. The question is whether the defendants are answerable for this conduct of the mate.

By the common law as understood in this state the work of construction was not one of the matters which the defendants were bound at their peril to see done with reasonable care, and therefore, if those engaged upon it were fellow-servants in their general standing and occupation, the plaintiff took the risk of ⁴⁷⁰ their negligence. They were not removed from the class of fellow-servants for the time being by the nature of their occupation, to adopt the mode of expression which has been used: *Johnson v. Boston Towboat Co.*, 135 Mass. 209; 46 Am. Rep. 458; *Moynihan v. Hills Co.*, 146 Mass. 586; 4 Am. St. Rep. 348; *Allen v. Smith Iron Co.*, 160 Mass. 557. But if the work had been done by the defendants in person, and they had done it negligently, they would have been liable, and it is argued that they are equally liable when the work is done by the master of the vessel, or by one who for the time being stands in his place. It is said that the master is not a fellow-servant with the seamen, and therefore is not within the rule as to the risks assumed by the plaintiff, but that he is nevertheless an agent and representative of the owners, and that his negligence is their negligence. Even if it be said, as it has been said in some cases, that masters are not liable to servants for the negligence of others except when the law, on grounds of policy, imposes a personal duty on them to see certain precautions taken or reasonable care used; and if it be admitted, therefore, that the defendants could not be liable for negligence in the construction of the triangle on the part of the master, whether a servant or not, any more than where the same work was done by the seamen: *Quinn v. New Jersey Lighterage Co.*, 23 Fed. Rep. 363; *The Queen*, 40 Fed. Rep. 694, 696; *Loughlin v. State*, 105 N. Y. 159, 162; *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 385. Still, ordering the plaintiff to use the faulty triangle was an act belonging to the superior officer as such, and it might be that as to that a different rule would apply.

Looking at the reason given for the exception to the general liability of masters for servants, the last suggestion cannot prevail. If the sailor takes the risk of a negligent injury to his person from a fellow-sailor there is equal reason to say that he takes the risk of a negligent command. A command is a transitory act which the employer has no chance to supervise. It is not like a permanent condition of land or machinery, or the abiding incompetence of an employee: See *Flynn v. Campbell*, 160 Mass. 128, 130. If the defendants

have been guilty of no personal negligence, and the plaintiff does take the risk of the negligence of some persons with whom his work will bring him into contact, the question whether the negligence of one of those ⁴⁷¹ persons is within or outside of the risks assumed is not a matter of names or dignities. That is too well settled to need the citation of cases: *Moody v. Hamilton Mfg. Co.*, 159 Mass. 70; 38 Am. St. Rep. 396. The question is what he must be taken to have contemplated when he went into the employment. The chances of negligence on the part of a superior employed in the common business are as obvious as in the case of one of a lower grade, and therefore when the duty is not personal to the employer, the same rule applies, whatever the degree of the negligent employee: *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368, 384. These considerations apply, and have been applied by common-law courts, to the captain of a vessel, and it has been said that he is a fellow-servant within the meaning of the rule: *Hedley v. Pinkney & Sons Steamship Co.* [1892], 1 Q. B. 58; *Loughlin v. State*, 105 N. Y. 159. So in this commonwealth as to a mate: *Benson v. Goodwin*, 147 Mass. 237. Without considering what may be the best mode of expressing it, we agree with the result of these cases.

But it is argued that a different doctrine obtains in the admiralty, and that we ought to follow the law which would be administered by the courts especially constituted for the affairs of seamen. For this argument it does not matter precisely where the vessel was. If the accident happened within the body of the county the admiralty jurisdiction would not be excluded: *Waring v. Clarke*, 5 How. 441; *The Commerce*, 1 Black, 574; and, if upon the high seas, that of the common law is not to be denied: *Percival v. Hickey*, 18 Johns. 257; 9 Am. Dec. 210; *Wilson v. Mackenzie*, 7 Hill, 95, 97; 42 Am. Dec. 51.

The case most relied on is *The A. Heaton*, 43 Fed. Rep. 592, followed by *The Frank and Willie*, 45 Fed. Rep. 494, and *The Julia Fowler*, 49 Fed. Rep. 277. Compare *Mors v. Slus*, 1 Vent. 238; 3 Keb. 135, 1 Molloy de Jure Marit., b. 2, c. 2, sec. 2. If the American cases meant that the admiralty courts had worked out the liability of the ship for the acts of the captain from their own peculiar principles it might be necessary to inquire whether the personal liability of the owner necessarily followed from the same premises, and, if it did, why the common law should yield to the admiralty rather

than the admiralty to the common law. But it hardly is to be expected that different ⁴⁷² views of the substantive law should be enforced by the same judges sitting in different courts. In *The A. Heaton*, 43 Fed. Rep. 592, Mr. Justice Gray did not declare a doctrine peculiar to the admiralty; he merely deferred to a decision upon the common law from which he himself had dissented, which is inconsistent with the cases in this commonwealth, and which has been explained by a later decision of the court which rendered it: *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 377. See *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368. Under these circumstances the circuit court cases do not seem to us a sufficient reason for departing from the common law, because the accident happened on board ship. Moreover, it is very plain that we cannot adopt the admiralty law as a whole. We cannot divide the damages when the plaintiff has been guilty of contributory negligence as was done in *The Julia Fowler*, 49 Fed. Rep. 277; *The Max Morris*, 137 U. S. 1. See *Dowell v. General Steam Nav. Co.*, 5 El. & B. 195, 206.

Verdict set aside.

SHIPPING—MASTER AND SERVANT.—THE LIABILITY OF SHIPOWNERS for injuries to seamen through the negligence of the officers of a vessel is thoroughly discussed in *Gabrielson v. Waydell*, 135 N. Y. 1; 31 Am. St. Rep. 793, and the extended note thereto at pages 807-809.

MILLER v. HYDE.

[161 MASSACHUSETTS, 472.]

LAW OF OTHER STATES.—If the laws of another state determining the rights of the parties are not shown, the laws of this state must be applied.

JUDGMENT IN TROVER, EFFECT OF ON THE TITLE TO PROPERTY.—A judgment in trover does not transfer the title to the property. Such title remains in the plaintiff until he receives satisfaction; nor does the fact that he attaches the property upon mesne process in the action of trover, and after obtaining judgment therein levies upon it as the property of the judgment debtor, constitute an irrevocable election to treat the title to such property as vested in the defendant.

REPLEVIN by the administratrix of the estate of H. W. Miller to recover the possession of a horse. The animal was bought by the decedent in July, 1890, acting by his agent, George Bryden, in the state of Connecticut, and was kept by

such agent at Hartford, in that state. He, on demand being made on him for the horse in November of the same year by the administratrix, refused to deliver it, and claimed to be the owner of a half interest therein. In March, 1891, he sold and delivered the horse to J. C. Davenport and Ada L. Hyde, residents of Connecticut. Ancillary administration having been granted to the plaintiff in Connecticut, she brought an action in that state against Bryden, Davenport, E. A. Hyde, and one Shillinglaw for the conversion of the horse, and attached it upon mesne process. Judgment was entered against Bryden only, under which an execution was issued, and the horse levied upon. Before it was sold it was replevined by Davenport, who in August, 1892, placed it in the possession of the defendant, and it was brought into this state, and seized in the present action. The judgment in trover recovered in Connecticut remained wholly unsatisfied, and the action of replevin brought by Davenport in the same state was still pending.

E. A. Whitman, for the plaintiff.

J. H. Morrison, for the defendant.

474 BARKER, J. The plaintiff may maintain replevin if she is the owner of the horse, and if she is not estopped from asserting her ownership against the defendant. As administratrix of her husband's estate she was the owner when she brought trover in Connecticut against Bryden, the bailee, who had wrongfully usurped dominion, and sold and delivered the horse to Davenport. As the horse was in Connecticut, and the action of trover was in the courts of that state, the effect of the suit upon her title would be determined by the law of the forum. But as the law of Connecticut is not stated as an agreed fact, we must apply our own. Whether a plaintiff's title to the chattel is transferred upon the entry in his favor of judgment in trover has not been decided by this court. Assuming that in early times title to the chattel was transferred to the defendant upon the entry of judgment for the plaintiff in trover, at present a different doctrine is generally applied, and it is now commonly held that title is not transferred by the entry of judgment, but remains in the plaintiff until he has received actual satisfaction: See *Atwater v. Tupper*, 45 Conn. 144; 29 Am. Rep. 674; *Turner v. Brock*, 6 Heisk. 50; *Lovejoy v. Murray*, 3 Wall. 1; *Ex parte Drake*, 5 Ch. Div. 866; *Brinsmean v. Harrison*,

L. R. 7 Com. P. 547; 1 Greenleaf on Evidence, sec. 533, and note; and the law has been commonly so administered by our own trial courts. We think this doctrine better calculated to do justice, and see no reason why we should not hold it to be law.

Whenever the title passes, as there has been no sale or gift, and no title by prescription or by possession taken upon abandonment by the true owner, the transfer is made by his inferred election to recognize as an absolute ownership the qualified dominion wrongfully assumed by the defendant. The true owner makes no release in terms, and no election in terms, to relinquish his title; but the election is inferred by the law to prevent ⁴⁷⁵ injustice. Formerly, this election was inferred when judgment for the plaintiff was entered, because his damages, measured by the value of the chattel and interest, were then authoritatively assessed, and the judgment brought to his aid the power of the court to enforce its collection out of the wrongdoer's estate, or by taking his person; and this was deemed enough to insure actual satisfaction. If so, it was just to infer that when he accepted these rights he elected to relinquish to the wrongdoer the full ownership of the chattel. An election was not inferred when the suit was commenced, although the plaintiff then alleged that the defendant had converted the chattel, and although the writ might contain a *capias* because, owing to the uncertainties attendant upon the pursuit of remedies by action, it was not just to infer such an election while ultimate satisfaction for the wrong was but problematical. Forms of action are a means of administering justice, rather than an end in themselves. When it is seen that the practical result of a form of action is a failure of justice the court will make such changes as are necessary to do justice. If the entry of judgment in trover usually gave the judgment creditor but an empty right it was not just to infer that upon acquiring such a right he relinquished the ownership of the chattel, and the rule that required the inference to be then drawn was properly changed. The ground for inferring such an election was that upon the entry of judgment he acquired an effectual right in lieu of his property, and the doctrine that without some actual satisfaction the inference of an election would not be drawn has been shown by experience to be necessary to the administration of justice, and has been generally acted upon, and the modern rule adopted that the plaintiff's title is not transferred by the

entry of judgment, but is transferred by actual satisfaction. Trover is but a tentative attempt to obtain justice for a wrong, and until pursued so far that it has given actual satisfaction ought not to bar the plaintiff from asserting his title. The present doctrine is consistent with the general principle stated by Lord Ellenborough in *Drake v. Mitchell*, 3 East, 251, and quoted in *Vanuxem v. Burr*, 151 Mass. 386, 389, 21 Am. St. Rep. 458, as approved in *Lord v. Bigelow*, 124 Mass. 185, that "a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in ⁴⁷⁶ satisfaction to the party." Whether the holder of an unsatisfied judgment in trover can without a fresh taking maintain replevin against the same defendant, or is restricted to one action against the same person for a single tort, we do not now decide: See *Bennett v. Hood*, 1 Allen, 47; 79 Am. Dec. 705; *Trask v. Hartford etc. R. R. Co.*, 2 Allen, 331; *Bliss v. New York Cent. etc. R. R. Co.*, 160 Mass. 447; 39 Am. St. Rep. 504. If he is so restricted it is not because the ownership of the chattel has been transferred.

But the present plaintiff has done more than to take judgment in trover. In her action of trover she caused the horse to be attached upon mesne process, and since obtaining judgment she has caused the horse to be seized as property of Bryden in execution on the judgment as his property, and to be kept and offered for sale on the execution until, as it was about to be so sold, it was replevied by Davenport from the officer in a suit between them which is still pending in Connecticut. That suit is not a bar to this action, because it is not between the same parties: *White v. Dolliver*, 113 Mass. 400; 18 Am. Rep. 502; *Newell v. Newton*, 10 Pick. 470. But we must still inquire whether, assuming that the plaintiff's property in the horse was not transferred by her judgment in trover, it was transferred by that judgment taken in connection with the facts of the attachment and levy, and also whether she is estopped by the attachment and the levy from asserting her title in this action.

In the first place, the doctrine that a mortgagee of personalty who attaches the mortgaged goods on a writ against the mortgagor cannot afterwards enforce his mortgage is not in point. The mortgagee is not the owner, but has merely a lien, and may well be held to relinquish that lien when by the attachment he establishes another. But if the plaintiff has actual ownership, and thus the full right to do with his

own property as he may choose, merely procuring it to be attached on mesne process, or seized on execution as the property of another, does not work a change of ownership. The owner does not sell or give away his goods. In cases which are likely to occasion such conduct there usually is as in the present case, a disputed title; and it is with the hope of avoiding litigation over it that the real owner consents that the chattel shall, for a special purpose only, be treated as the property of another. This is ⁴⁷⁷ "consistent with an intention ultimately to assert title should circumstances render it desirable for him so to do"; and he may well wait to see the issue, which may be such as to avoid the litigation of the question of title: See *Mackay v. Holland*, 4 Met. 69, 74; *Dewey v. Field*, 4 Met. 381, 384; 38 Am. Dec. 376; *Johns v. Church*, 12 Pick. 557; 23 Am. Dec. 651; *Bursley v. Hamilton*, 15 Pick. 40, 43; 25 Am. Dec. 423; *Edmunds v. Hill*, 133 Mass. 445, 446. Nor is there any good reason why such a use of his own property by a plaintiff in trover should be held to divest him of his ownership when it would not have that effect in other forms of action. In trover he is, in legal effect, asserting by his suit that the title is and will remain in himself until he receives satisfaction on a judgment, and his subjection of the chattel to attachment or to seizure on execution is simply a use which he chooses to make of his own property which does not divest him of title, or hamper him in the subsequent assertion of his ownership, except by the rules of estoppel. The case of *Ex parte Drake*, 5 Ch. Div. 866, above cited, is an authority to the point that a plaintiff who has brought an action of detinue, and taken judgment both for the detention and the value of the chattel, and has also proved his judgment in bankruptcy after having had the chattel seized on execution as the defendant's property, may nevertheless assert his ownership and have process to restore to him the chattel in specie. In such cases courts look to substance rather than form, and do not by inferring an election or a waiver deprive of his property a plaintiff who has unfortunately resorted to some futile method of procuring redress.

In the present case the natural construction to be put upon the plaintiff's conduct in attaching and beginning a levy upon her own horse in a suit asserting her ownership is, that, while she contended that in fact the horse was her own, she consented that, if litigation as to the true state of

title could be avoided by so selling the horse that the proceeds of the sale should be applied upon her claim for damages, she would, in that event, no longer assert her paramount title. Her implied offer not having been accepted, and Davenport having rendered impossible the accomplishment of her plan to avoid further litigation, she could thereupon say that all which had gone before was provisional upon the completion of the levy, and could enforce her ⁴⁷⁸ right of property by any proper action against Davenport, or any one who might thereafter take wrongful possession of her horse, unless she was barred by the rules of estoppel.

Upon the question of estoppel it is material to the decision of the present case to consider only whether she is estopped as to the present defendant or his principal, Davenport. Whether she has rendered Bryden, or the officer who made the attachment or the levy in the Bryden suit, liable to costs, expenses, or chance of loss, is not material upon the question whether she is barred by the doctrines of estoppel from maintaining the present action. She is now prosecuting one of several successive wrongdoers for a fresh interference with the possession of her property; and neither the present defendant, Hyde, nor Davenport, for whom he claims to be acting as agent, has done or suffered any thing, or been put to any liability by reason of which the plaintiff should be estopped from asserting her title. Upon the facts, Davenport, in taking the horse in replevin, did not rely upon the attachment or levy, but acted in denial of their validity; and Hyde is not shown to have been influenced by them in consenting to become Davenport's agent in keeping the horse, or in any manner. Neither Hyde nor Davenport is shown to have changed his position or course of conduct, relying upon the plaintiff's action in causing the attachment or the levy, and the plaintiff is not estopped by it from maintaining the present action. In the opinion of a majority of the court the result must be judgment set aside, and judgment for the plaintiff ordered.

JUDGE HOLMES dissented, saying: "It has always seemed to me that one whose property has been converted has elected between two courses—that he may have the thing back or may have its value in damages, but that he cannot have both; that when he chooses one he necessarily gives up the other, and that by taking a judgment for the value he does choose one conclusively. He cannot have a right to the value of the thing, effectual or ineffectual, and a right to the thing at the same time. The defendant is estopped by the judgment to deny the plaintiff's right to the value of the

thing. Usually estoppels by judgment are mutual. It would seem to follow that the plaintiff also is estopped to deny his right to the value of the thing, and therefore is estopped to set up an inconsistent claim. In general an election is determined by judgment: *Butler v. Hildreth*, 5 Met. 49; *Bailey v. Hervey*, 135 Mass. 172, 174; *Goodyear Dental Vulcanite Co. v. Caduc*, 144 Mass. 85, 86; *Raphael v. Reinstein*, 154 Mass. 178, 179. I know of no reason why a judgment should be less conclusive in this case than any other. Of course, I am speaking of a judgment for the value of the chattel, not of one giving nominal damages for the taking. The argument from election is adopted in *White v. Philbrick*, 5 Greenl. 147, 150, 17 Am. Dec. 214, which, so far as I know, is still the law of Maine, notwithstanding the remark in *Murray v. Lovejoy*, 2 Cliff. 191, 198. See, also, Shaw, C. J., in *Butler v. Hildreth*, 5 Met. 49, 53.

"The most conspicuous cases which have taken a different view speak of the hardship of a man's losing his property without being paid for it, and sometimes cite the *dictum* in Jenkins, 4th Century, case 88, *Solutio pretii emptiois loco habetur*, which is dogma, not reasoning; or, if reasoning, is based on the false analogy of a sale; but they leave the argument which I have stated unanswered, not, as I think, because the judges deemed it unworthy of answer or met by paramount considerations of policy, but because they did not have either that or a clue to the early cases before their mind: *Lovejoy v. Murray*, 3 Wall. 1, 17; *Brinsmead v. Harrison*, L. R. 6 Com. P. 584, 587; L. R. 7 Com. P. 547, 554. It is not the practice of the English judges to overrule the common law because they disapprove it, and to do so without discussion. In *Brinsmead v. Harrison*, L. R. 6 Com. P. 584, 587, L. R. 7 Com. P. 547, 554, Mr. Justice Willes thought he was proving that the common law always had been in accord with his position. So far as the question of policy goes it does not seem to me that the possibility—it is only the possibility—of an election turning out to have been unwise, is a sufficient reason for breaking in upon a principle which must be admitted to be sound on the whole, and for overthrowing the doctrine of the common law by a judicial fiat. I am not informed of any statistics which establish that judgments for money usually give the judgment creditor only an empty right.

"That the view which I hold is the view of the common law I think may be proved by considering what was the theory on which the remedies of trespass and replevin were given. In Year Books 19 Henry VI. 65, pl. 5, Newton says: 'If you had taken my chattels it is at my choice to sue replevin, which shows that the property is in me, or to sue a writ of trespass, which shows that the property is in the taker; and so it is at my will to waive the property or not.' In 6 Henry VII. 8, pl. 4, Vavisor uses similar language, and adds: 'And so it is of goods taken, one may divest the property out of himself, if he will, by proceedings in trespass, or demand property by replevin or writ of detinue,' if he prefers. There is no doubt that the old law was that replevin affirms property in the plaintiff and trespass disaffirms it, and that the plaintiff has election: Browne's Abridgment, Trespass, pl. 134; 18 Vin. Abr. 69, E; Anderson and Warberton, JJ., in *Bishop v. Montague*, Cro. Eliz. 824. The proposition is made clearer when it is remembered that a tortious possession, at least if not felonious, carried with it a title by wrong in the case of chattels as well as in the case of a disseisin of land, as appears from the page of Viuer just cited, and as has been shown more fully by the learned researches of Mr. Ames and Mr. Maitland, 3 Harv. Law Rev. 23, 326: See 1 L. Q. Rev.

824. I do not regard that as a necessary doctrine, or as the law of Massachusetts, but it was the common law, and it fixed the relations of trespass and replevin to each other. Trespass, and on the same principle trover, proceeds on the footing of affirming property in the defendant, and of ratifying the act of the defendant which already has affirmed it. I do not see on what other ground a judgment for the value can be justified. If the title still is in doubt, or remains in the plaintiff, the defendant ought not to be charged for any thing but the tortious taking. Again, cannot the plaintiff take the converted chattel on execution? And on what principle can he do so if it does not yet belong to the defendant?

"I say but a word as to the practical difficulties of the prevailing rule. No doubt they can be met in one way or another. Suppose the plaintiff after judgment were to retake the chattel by his own act it would strike me as odd to say that this satisfied the judgment, and as impossible to say that it satisfied the whole judgment, which was for the tort, as well as for the value of the property. Yet on the view which I oppose I presume that the judgment could not be collected: See *Coombs v. Sansom*, 1 Dowl. & R. 201.

"It seems to me that the opinion which I hold was the prevailing one in England until *Brinsmead v. Harrison*, L. R. 6 Com. P. 584, 587; L. R. 7 Com. P. 547, 554; *Bishop v. Montague*, Cro. Eliz. 824. Fenner, J., in *Brown v. Woolton*, Cro. Jac. 73, 74; Yel. 67; Moore, 762; *Adams v. Broughton*, 2 Strange, 1078; Andrew, 18, 19; *Buckland v. Johnson*, 15 Com. B. 145, 157, 162, 163; Manning's note to 6 Man. & G. 640: See *Lamine v. Dorrell*, 2 Ld. Raym. 1216, 1217. And I should add that I see a relic of the ancient and true doctrine in the otherwise unexplained notion that when execution is satisfied the title of the defendant relates back to the date of the conversion: *Hepburn v. Sewell*, 5 Har. & J. 211; 9 Am. Dec. 512; *Smith v. Smith*, 51 N. H. 571; 50 N. H. 212. Compare *Atwater v. Tupper*, 45 Conn. 144, 147, 148; 29 Am. Rep. 674.

"The only authorities binding upon us are the ancient evidences of the common law as it was before the Revolution and our own decisions. I have shown what I think was the common law. Our own decisions leave the question open to be decided in accordance with it: *Campbell v. Phelps*, 1 Pick. 62, 65, 70; 11 Am. Dec. 139; *Bennett v. Hood*, 1 Allen, 47; 79 Am. Dec. 705. Many cases in other states are collected in Freeman on Judgments, 4th ed., sec. 237.

"If I am right in my general views they apply to this case. The plaintiff recovered her judgment in Connecticut, to be sure, as ancillary administrator there, but the horse was there, and she was entitled to it there, so that her judgment recovered there passed the title. Like any other transfer of a chattel valid in the place where it was made and where the chattel was situated, it will be respected elsewhere. The Connecticut law was not put in evidence, and therefore we must presume that a judgment there has whatever effect we attribute to it on the principles of the common law. It is not argued that the defendant stands any worse than Bryden, against whom the judgment was recovered, and from whom the defendant's bailor bought the horse."

Judge Knowlton also dissented, saying: "I am of the opinion that the judgment in this case should be for the defendant. It is a general rule of law that, when one is entitled to either of two inconsistent remedies for a wrong done him, the pursuit of one of them so far as to affect the interests of the other party is a conclusive election, and a waiver of the other: *Hooker*

v. *Olmstead*, 6 Pick. 481; *Butler v. Hildreth*, 5 Met. 49, 53; *Arnold v. Richmond Iron Works*, 1 Gray, 434, 440; *Connihan v. Thompson*, 111 Mass. 270; *Washburn v. Great Western Ins. Co.*, 114 Mass. 175; *Ormsby v. Dearborn*, 116 Mass. 386; *Seavey v. Potter*, 121 Mass. 297; *Bailey v. Hervey*, 135 Mass. 172, 174; *Goodyear Dental Vulcanite Co. v. Caduc*, 144 Mass. 85, 86; *Raphael v. Reinstein*, 154 Mass. 178. It is under this rule that the owner of property wrongfully taken by another is held to be precluded from claiming it after he has elected to recover the value of it from the wrongdoer. The property passes, not because there has been a sale, but because the owner has elected to receive instead of it that which represents it, and because it would be unjust to permit him to take the property after having chosen the money which is its equivalent. The principal question in cases of this kind is at what stage of the proceedings the owner shall be deemed to have made an election that binds him. On principle, and as a general rule, he should be bound by the election he makes, if in making it he goes so far as to affect the rights or interests of the other party. It would be unjust, when he may proceed only in one or the other of two opposite directions, that he should go forward in one direction in such a way as materially to affect the other party, and then turn backward and go on in the other, and compel his adversary to satisfy him in a different way.

"In very early cases it was held that the owner of property unlawfully taken makes a conclusive election of his remedy which passes the property as between the parties when he takes judgment for the value of it against the wrongdoer. He thereby puts his claim for property of which he chooses to say that he has been divested into the form of a debt apparent of record, for the satisfaction of which he may at any time have execution from the court.

"But where nothing more is done than to take a judgment without security there are considerations which have led in many courts to a modification of the rule in favor of the owner. Sometimes when he brings his suit in trover he is unable to find the property, and very often his judgment for the value of it cannot be made available. In taking judgment he merely puts in form and settles by adjudication a claim for the value of the property, to which he was entitled from the beginning if he chose to enforce it. He does not otherwise disturb the defendant or his property, and, while it would doubtless be more logical to say that he is concluded by his election as soon as he has recovered judgment, it is perhaps a practical rule which will more generally work out justice to hold that if he does nothing more to collect the money, and if he proceeds within a reasonable time, he may still take the property as his own. But if, having fixed the liability of the defendant for a debt by taking judgment, he says by his conduct that he intends to collect the debt, and does that which affects the interests of the defendant in that particular, he should be deemed to have made his election conclusive.

"The cases which say that the rights of the parties in regard to the title are fixed, not by taking judgment, but by obtaining satisfaction, cannot mean that one may take judgment for the full value of the property, and collect one-half or two-thirds of the amount, and may afterward take and hold the property itself under his original title. Many of these cases were in jurisdictions where attachment on mesne process is not permitted, and where there is no security for a judgment when it is rendered. So far as I am aware, there is no case in which is considered the effect of taking judgment in a suit where there was an attachment which secured the collection

of the judgment, or the effect of a partial satisfaction, or of a proceeding after judgment to enforce it by a levy on the property. It seems to me there is good ground for holding that, when one undertakes to collect the value of his property by making an attachment to secure the judgment which he may obtain, and then prosecutes his claim to judgment, he has done that which affects the rights of the other party far more than the mere recovery of a judgment on an unsecured claim. But however that may be, when, after judgment, the plaintiff proceeds to obtain satisfaction by a levy on the defendant's property, and much more when he levies on the property for the value of which he obtained judgment, and advertises it for sale as the property of the defendant, he should be held to have fixed his rights and the rights of the other party in regard to the title beyond his power to change them. By taking the defendant's property to satisfy the execution he subjects him to the legal costs and expenses attendant upon the levy, and deprives him of what otherwise he would have. Even if he afterwards returns the property he puts upon him the risk of loss or depreciation in value while it is held. If the property had not been taken on execution the defendant might have negotiated to obtain the means of satisfying the execution by disposing of the property, or he might have attempted to satisfy it in some other way. He may have relaxed his efforts, relying on the levy, and if the plaintiff is permitted to abandon the levy and proceed in another way he may ultimately suffer loss on account of what the plaintiff did. This is equally true whether the property is that for which the plaintiff recovered his judgment or not, and if it is the same the plaintiff's act is a distinct and positive assertion that the property is the defendant's by reason of his judgment, and of his purpose to collect the judgment, and to apply the proceeds of the property in the satisfaction of it. Unless the rule stated at the beginning of this opinion is to be abrogated altogether it must be held that when a plaintiff has elected to take judgment for the full value of property converted, and has then levied the execution upon property of the defendant which is subject to be taken on execution—especially if it is the property converted—he is thereby precluded from reversing his election, and taking the converted property under his original title.

"The case of *Ex parte Drake*, 5 Ch. Div. 866, cited in the opinion of the majority of the court, was an action of detinue, where, by the terms of the judgment, the plaintiff was to have either the property or the ascertained value of it.

"If the plaintiff cannot abandon her judgment and levy, and reclaim the horse as against Bryden, she cannot as against this defendant, who is in privity with Bryden through Davenport, who is a *bona fide* purchaser from Bryden. So far as the pending proceedings in Connecticut under the levy and the subsequent replevin suit there affect the title, they are binding on the plaintiff here, for the officer was acting in enforcement of her rights by her direction, and she is therefore in privity with him. His relation to her is very different from that of a mere bailee."

The chief justice concurred in this opinion.

Of the Vesting of Title by a Judgment for the Value of Personal Property in Actions of Trespass or of Trover.

The opinion of the court in the principal case and the vigorous dissenting opinions on the part of the minority of the judges warrant the conclusion that the judicial dissension at an early day existing among the courts respect-

ing the effect of the entry of a judgment in an action of trespass or trover for the full value of the property alleged to be converted or otherwise interfered with, has not yet terminated, and there is still a reluctance in abandoning the doctrine that such judgment, though wholly unsatisfied, results in the transmission of the title of the property to the wrongdoer. The early cases in England tending to give this effect to a judgment were, as is shown in the opinions in the principal case, overruled by *Brinsmead v. Harrison*, L. R. 6 Com. P. 589. While, of course, it is not possible for any one court in the United States to overrule the opinions previously announced in all the other courts, the opinion of the supreme court of the United States in the case of *Lorejoy v. Murray*, 3 Wall. 1, did much towards impairing the force of pre-existing decisions in the United States not in harmony therewith, and in establishing the doctrine that a judgment in trover or trespass does not without satisfaction transfer the title of personal property for the converting or injuring of which a judgment has been rendered.

In section 237 of *Freeman on Judgments* we endeavored to state the existing condition of the authorities upon this subject, and, after reflection and further consideration, have no disposition to modify the statement there made, and hence here quote it in full. "Where, instead of suing for the mere damages occasioned by an act of trespass or conversion, the plaintiff recovers judgment for the value of the property injured or converted, it has frequently been held that the recovery vests the title to the property in the defendant, and that as it would be unjust for the defendant to acquire title to the property taken or injured, while others might be made liable to pay the entire value thereof in a subsequent action, the plaintiff could not be allowed to proceed against any other person concerned in the trespass or conversion, and not included in the first action: *Acheson v. Miller*, 2 Ohio St. 203; 59 Am. Dec. 663; *Campbell v. Phelps*, 1 Pick. 62; 11 Am. Dec. 139; *Brown v. Wooton*, Yel. 67; *Adams v. Broughton*, 2 Strange, 1078; *Floyd v. Browne*, 1 Rawle, 121; 18 Am. Dec. 602; *Woolley v. Carter*, 7 N. J. L. 85; 41 Am. Dec. 520; *White v. Philbrick*, 5 Greenl. 147; 17 Am. Dec. 214; *Emery v. Nelson*, 9 Serg. & R. 12; *Buckland v. Johnson*, 15 Com. B. 145; 23 L. J. Com. P. 204. This last case has been overruled by *Brinsmead v. Harrison*, L. R. 6 Com. P. 588. If, indeed, the mere rendition of a judgment transferred the title of property in such cases to defendant, the plaintiff's cause of action would of course cease to be held by him, and his claim to further proceedings based upon it could not be supported. But the American courts have not generally attributed this effect to judgments. The transfer of title, in their opinion, does not take place until the judgment is completely satisfied, and the value of the property as ascertained by the court has been paid to the plaintiff. Until such judgment, therefore, there is no obstacle to prevent him from seeking redress in the courts against any one originally liable: *Osterhout v. Roberts*, 8 Cow. 43; *Spivey v. Morris*, 18 Ala. 254; 52 Am. Dec. 224; *Smith v. Alexander*, 4 Sued. 482; *Sanderson v. Caldwell*, 2 Aiken, 203; *Jones v. McNeil*, 2 Bail. 466; *Morgan v. Chester*, 4 Conn. 387; *Matthews v. Menedger*, 2 McLean, 145; *Hyde v. Noble*, 13 N. H. 501; *McGee v. Overby*, 12 Ark. 164; *Sharp v. Gray*, 5 B. Mon. 4; *Hepburn v. Sewell*, 5 Har. & J. 212; 9 Am. Dec. 512; *Lorejoy v. Murray*, 3 Wall. 1; *Elliott v. Haylen*, 104 Mass. 160; *Smith v. Smith*, 50 N. H. 219; *McReady v. Rogers*, 1 Neb. 124; 93 Am. Dec. 333; *St. Louis etc. Ry. Co. v. McKinsey*, 78 Tex. 298; 22 Am. St. Rep. 54; *Vanuzem v. Burr*, 151 Mass. 386; 21 Am. St. Rep. 458; *Atwater v. Tupper*, 45 Conn. 144; 29 Am. Rep. 674; note to *Woolley v. Carter*, 11 Am. Dec. 524.

When the judgment has been paid, the title to the property is, for most purposes, vested in the defendant by relation at the date of the conversion. When the plaintiff has succeeded in compelling this involuntary purchase and payment the title thereby acquired by the defendant relates back to the date of the conversion, because that is the period at which the plaintiff has chosen to treat the property as purchased from him by the defendant: *Hepburn v. Sewell*, 5 Har. & J. 211; 9 Am. Dec. 512. Therefore, if, after recovering judgment for the conversion of certain chattels, the plaintiff retakes the same chattels into his possession, and subsequently to such retaking he enforces the collection of the judgment, such collection vests the property in the defendant as of the date of the original conversion, and entitles him to recover against the plaintiff for the retaking: *Smith v. Smith*, 51 N. H. 571; 50 N. H. 219. But the relation of title back to the period of the conversion will not be permitted to take effect to the prejudice of third persons so as to make them liable as trespassers: *Bacon v. Kimmel*, 14 Mich. 201.

PFEIFFER v. MATTHEWS.

[161 MASSACHUSETTS, 487.]

PARTY WALLS, USE OF, WHAT IS, AND WHO ANSWERABLE FOR.—If a contract provides that if any portion of a party wall shall be extended and rebuilt, and shall be used by either of the contracting parties, or his assigns or heirs, he or they shall pay the party who constructed the same, or his heirs or assigns, one-half the actual cost of the portion so used by him, the use of the wall means making use of it in the progress of constructing the house on the adjoining land, and the builder of such house is the person who uses the wall and becomes liable for one-half of the cost thereof, and one who purchases from him after his house is constructed, and thereafter maintains such house, does not thereby become chargeable under the contract for using the wall. A mortgagee cannot be held liable under the contract, though his mortgage was executed before the use of the wall was made, and he afterwards foreclosed the mortgage and thereby became the owner of the property.

F. Rackemann and F. V. Balch, for the plaintiff.

F. W. Kittredge, for the defendant.

488 ALLEN, J. The clause of the agreement upon which the plaintiff's claim rests is as follows: "When any portion of any wall so built, extended, or rebuilt shall be used by the party, or by the heirs or assigns of the party, by whom the portion of the wall so used was not constructed, he or they shall pay to the party who constructed the same, or to his heirs or assigns, owners 489 of the said premises, one-half of the actual cost of the portion of the wall (including the piling and the foundation thereof) so used by him or them."

Using the wall means making use of it in the process of constructing the house on the adjoining lot, and the builder of such house is the person who uses the wall. Under such an agreement the liability to pay for one-half of the cost of the wall does not extend to a grantee of the builder.

The plaintiff, however, contends that a mortgagee of land which is subject to a party wall agreement is liable as assignee of the covenants for a use of the wall made by the mortgagor. No case has been cited which thus holds, and we see no good reason for establishing such a doctrine. A mortgagee before foreclosure has no estate which can descend to his heirs, but by foreclosure the lien is converted into an estate, and the mortgage is changed from personal to real property: Pub. Stats., c. 133, sec. 6; *Fay v. Cheney*, 14 Pick. 399; *Steel v. Steel*, 4 Allen, 417; *Haskins v. Hawkes*, 108 Mass. 379. As to everybody but the mortgagee, the mortgagor is the owner until foreclosure. Until then, or at least until entry for breach of condition, the adjoining owner has no concern with the mortgagee. It is the mortgagor alone who is using the party wall by building a house upon his lot.

By the agreed statement of facts it appears that no work was done upon the wall while the defendant was owner of the adjoining lot. The first stage of the work was done while Bassett was in possession as mortgagor, and the work was stopped owing to his insolvency. It does not appear that the defendant had any thing to do with the mortgagor's insolvency or with the stopping of the work. No entry was made for breach of condition. It is stated that while things were in this condition Bassett released all his rights in the premises to the defendant. It would seem that such release could have conveyed nothing, as the title was then in his assignee in insolvency. But assuming that the defendant then became owner of the equity, no work was done while he remained the owner. Soon afterwards he again conveyed the premises to Bassett, taking back a mortgage, and thus Bassett again became mortgagor, and the defendant mortgagee. After this had been done work on the building was renewed and completed. Nearly a year after its completion the defendant's mortgage was foreclosed.

400 The defendant's liability is no greater than if, at the time of the foreclosure, he had purchased the equity of redemption and taken a deed from the mortgagor. Under the agreement the heirs or assigns of the original party to the

contract are not liable to the plaintiff unless they have used the wall. The wall was used by Bassett alone. The continuance of the building after its erection is not a use of the wall within the meaning of the contract. The defendant's present ownership of the building is not a use of the party wall by him which makes him liable under the contract.

The plaintiff further argues that the conveyance to Bassett was a sham, and that the defendant was virtually the owner all the time. But the case comes before us on an agreed statement of facts. No such fact is agreed, and we cannot draw that inference.

Judgment for the defendant affirmed.

PARTY WALLS.—PROPER USE OF: See the note to *Beverett v. Edwards*, 14 Am. St. Rep. 469, and the extended note to *Block v. Ickam*, 92 Am. Dec. 289.

BISHOP v. EATON.

[161 MASSACHUSETTS, 496.]

GUARANTY, WHAT IS.—If one addresses a letter to another, saying, "If Harry needs more money let him have it, or assist him to get it, and I will see that it is paid," and the person to whom the letter is written acts upon it he is entitled to rely upon the writer only as a guarantor.

GUARANTY.—AN OFFER OF GUARANTY NEED NOT BE ACCEPTED IN WORDS, OR a promise to do any thing before acting upon it. It is not necessary ordinarily to notify the offerer of the acceptance of the offer. The doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer.

GUARANTY.—NOTICE OF THE ACCEPTANCE OF AN OFFER OF GUARANTY must be given within a reasonable time after such acceptance, if it is of such a kind that knowledge of it will not quickly come to the promisor.

GUARANTY, CONTRACT OF, WHEN COMPLETE.—If an offer to guaranty is made in consideration of an act to be done it becomes binding on the doing of the act, so far that the promisor cannot withdraw from his obligation, if within a reasonable time after the acceptance he is notified thereof.

GUARANTY.—NOTICE OF ACCEPTANCE GIVEN BY MAIL AND NOT RECEIVED.—He who makes an offer of guaranty consents that notice of its acceptance may be given in any reasonable way. If he and the party to whom the offer is made are so situate that communication by mail is naturally to be expected, then the deposit of a letter in the mail is all that is necessary, and the miscarriage of the letter and its consequent nondelivery do not make the notice ineffective to charge the guarantor.

GUARANTY—NOTICE OF DEFAULT.—One who becomes a surety on a note, relying on the guaranty of a third person that he shall not suffer thereby, is not under obligation to attempt to collect the money from the maker of the note, nor to promptly notify the guarantor of the maker's default, at least in the absence of evidence that the defendant was injured by the delay.

A GUARANTOR IS DISCHARGED BY AN EXTENSION OF THE TIME for payment of the debt, whose payment he guarantees, unless he subsequently ratifies the extension.

ACTION upon a guaranty. The plaintiff, a resident of Illinois, and connected in business with the defendant's brother Harry, received, in 1886, from the defendant a letter containing the offer of guaranty stated in the opinion of the court. In January of the following year plaintiff relying, as he alleged, on the offer of guaranty, became a surety of Harry on a note in favor of one Stark, payable in one year, and soon afterwards wrote the defendant a letter stating what he had done, and deposited it in the United States mail, properly addressed to the defendant at his home in Nova Scotia, and with the postage thereon prepaid. When the note fell due the time of payment was extended one year, but whether plaintiff assented to this postponement was disputed. In August, 1889, plaintiff asked defendant to take up the note, but the defendant answered, "Try to get Harry to pay it. If he don't, I will. It shall cost you nothing." The plaintiff paid the note on the first day of October, 1891. The defendant testified that he had no knowledge of the payment of the note by plaintiff until December 1, 1891. At the trial a number of instructions in favor of the defendant were asked for, of which the eighth was that "the extension of time for the payment of the note given at its maturity, without knowledge or consent of the defendant, discharged him from his contract, unless subsequently, with full knowledge of the facts, he consented and ratified the same." The defendant's request for instructions was refused, and the judge ruled, as a matter of law upon the findings, that the plaintiff was entitled to recover.

F. G. Cook, for the defendant.

R. W. Light, for the plaintiff.

438 KNOWLTON, J. The first question in this case is whether the contract proved by the plaintiff is an original and independent **439** contract of a guaranty. The judge found that the plaintiff signed the note relying upon the let-

ter, "and looked to the defendant solely for reimbursement if called upon to pay the note." The promise contained in the letter was in these words: "If Harry needs more money let him have it, or assist him to get it, and I will see that it is paid." On a reasonable interpretation of this promise the plaintiff was authorized to adopt the first alternative, and to let Harry have the money in such a way that a liability of Harry to him would be created, and to look to the defendant for payment if Harry failed to pay the debt at maturity; or he might adopt the second alternative and assist him to get money from some one else in such a way as to create a debt from Harry to the person furnishing the money, and, if Harry failed to pay, might look to the defendant to relieve him from the liability. The words fairly imply that Harry was to be primarily liable for the debt, either to the plaintiff or to such other person as should furnish the money, and that the defendant was to guarantee the payment of it. We are therefore of opinion that, if the plaintiff relied solely upon the defendant, he was authorized by the letter to rely upon him only as a guarantor.

The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional, and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do any thing before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer, and furnishes the consideration. Ordinarily, there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the ⁵⁰⁰ faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case

it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. In accordance with these principles it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration: *Babcock v. Bryant*, 12 Pick. 135; *Whiting v. Stacy*, 15 Gray, 270; *Schlessinger v. Dickinson*, 5 Allen, 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled, as matter of law, that upon the facts found the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject matter, and from their course of dealing, the rights of the parties are fixed, and a failure ⁵⁰⁷ actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would

subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done.

How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not now consider.

The plaintiff was not called upon under his contract to attempt to collect the money from the maker of the note, and it is no defense that he did not promptly notify the defendant of the maker's default, at least in the absence of evidence that the defendant was injured by the delay. This rule in cases like the present was established in Massachusetts in *Vinal v. Richardson*, 13 Allen, 521, after much consideration, and it is well founded in principle and strongly supported by authority.

We find one error in the rulings which requires us to grant a new trial. It appears from the bill of exceptions that when the note became due the time for the payment of it was extended without the consent of the defendant. The defendant is thereby discharged from his liability, unless he subsequently assented to the extension and ratified it: *Chace v. Brooks*, 5 Cush. 43; *Carkin v. Savory*, 14 Gray, 528. The court should therefore have ruled substantially in accordance with the defendant's eighth request, instead of finding for the plaintiff, as matter of law, on the facts reported. Whether the judge would have found a ratification on the evidence, if he had considered it, we have no means of knowing.

Exceptions sustained.

GUARANTY—NECESSITY FOR NOTICE OF ACCEPTANCE.—In case of a written guaranty for a debt yet to be created and uncertain in amount, the guarantor must be given notice within a reasonable time that the guaranty is accepted, and that credit has been given upon the faith of it: *Taussig v. Reid*, 145 Ill. 488; 36 Am. St. Rep. 504, and note. An undertaking of guaranty is primarily an offer, and does not become a binding obligation until it is accepted and notice of the acceptance given to the guarantor: *Saint v. Wheeler etc. Mfg. Co.*, 95 Ala. 362; 36 Am. St. Rep. 210, and note. See, also, the extended notes to *Thompson v. Glover*, 39 Am. Rep. 221, and *Gibbs v. Cannon*, 11 Am. Dec. 703; *Union Bank v. Coster*, 53 Am. Dec. 289, and the notes to *Kincheloe v. Holmes*, 45 Am. Dec. 47; *Reeds v. Dudley*, 59 Am. Dec. 345, and *Menard v. Scudder*, 56 Am. Dec. 619.

GUARANTY—NECESSITY FOR NOTICE OF DEFAULT.—In case of a collateral guaranty of a debt to be created, of an amount uncertain and unascertainable at the time, the guarantor is not liable without notice of the principal's default: *Milroy v. Quinn*, 69 Ind. 406; 35 Am. Rep. 227; *Walker v. Forbes*, 25 Ala. 139; 60 Am. Dec. 498, and note; *Taussig v. Reid*, 145 Ill. 488; 36 Am. St. Rep. 504, and note.

HOLST v. STEWART.

[161 MASSACHUSETTS, 516.]

VENDOR AND PURCHASER.—A MISREPRESENTATION AS TO THE FREQUENCY OF THE TIMES OF DEPARTURE AND ARRIVAL OF TRAINS at a railway station in the vicinity of Boston, near a dwelling-house, tends greatly to affect the value of the property, and may therefore be fraudulent.

VENDOR AND PURCHASER—MISREPRESENTATION—DILIGENCE.—One bargaining with another must use reasonable diligence to discover for himself facts obvious to an ordinary observer, of which the means of knowledge are equally available to both parties. Failing to do this, he cannot maintain an action of deceit for the misrepresentation of them. In the application of this rule the circumstances of each case should be considered to determine whether the plaintiff has been guilty of such inexcusable neglect as to preclude him under the general rule of public policy from having a remedy against one who has fraudulently abused his confidence.

MISREPRESENTATIONS, WHEN ACTIONABLE.—A misrepresentation to an intending purchaser of real property as to the time when trains arrive and depart from a station near by, falsely and fraudulently made by a broker employed by him and believed to be true, whereby a purchase of such property was induced, is actionable, though the plaintiff might have acquired from other persons the knowledge which he sought, and the means of knowledge were equally open to himself and to his broker.

MISREPRESENTATION, CARELESSNESS IN ACTING UPON.—One who employs brokers to effect an exchange of his property, and who, on visiting property for which it was proposed to effect an exchange, asks the time when the trains arrive and depart from an adjacent railway station, and is then assured by such broker, who falsely purports to read from a time-table, that such departures and arrivals are at certain times, cannot as a matter of law be held to have been so reckless in trusting the broker as to be precluded from recovering for the fraud practiced upon him in regard to the trains.

PLEADING.—A count for money had and received with a bill of particulars claiming two hundred dollars for cash paid by mistake and under misapprehension of the facts at the time of a conveyance to plaintiff by Sarah C. Saunders is, in the absence of a motion for further particulars, sufficient.

PRACTICE—NEW TRIAL, EFFECT OF ORDER FOR.—If there is a ruling at a trial that plaintiff cannot recover as to the first and third counts of his complaint, and a verdict in his favor on the second count, and a bill of exceptions filed by the defendant is sustained in the appellate court,

and a new trial granted, the defendant is not entitled to an order in the trial court affirming the judgment as to the first and third counts. There is no judgment. The order for the new trial leaves all matters open, and the plaintiff may move for, and be permitted to make, amendments to his pleadings.

TORT for false and fraudulent representations with a count in contract. Only the second and third counts were relied on at the trial. The second count of the declaration as amended alleged that the plaintiff purchased a tract of land from Sarah C. Saunders, and conveyed to her his estate at Everett, and paid defendants, who were acting as his agents, three hundred and fifty dollars in cash and his note for thirty-seven dollars; that defendants, to induce the purchase of the land of Saunders and the payment of the money and the giving of the note, falsely and fraudulently represented to the plaintiff that the railroad trains took aboard passengers and left the depot nearest the land in question for Boston at 5:50 o'clock in the morning of every week day and lots of times in the evening; that plaintiff, believing these representations to be true, was induced to purchase the lands and to convey lands of his in exchange therefor, and to pay the defendants the sum hereinbefore named; that the representations made respecting the trains were false, and that the plaintiff was prevented from going to and from his work in Boston at such times as were convenient to him, and as he would have been able to go had the trains arrived and departed at the times stated by the defendants. The third count was for money had and received with a bill of particulars claiming two hundred dollars for cash paid "by mistake and under misapprehension of the facts at the time of the conveyance to me by Sarah C. Saunders" of land at North Stoughton. Defendant demurred to the declaration, and claimed that the representations alleged therein were mere matters of opinion as much within the knowledge of the plaintiff as of the defendant, and therefore were not actionable, and that the bill of particulars was insufficient. The demurrer was overruled. At the trial evidence was offered in support of the second count tending to show the employment by plaintiff of the defendants as his brokers to effect an exchange of properties, and that one of their number to induce such exchange made to plaintiff the misrepresentations alleged in the complaint. The cause was submitted to the jury on the second count, and a verdict returned for the

plaintiff. At a former trial of the cause the court had ruled that the first and third counts of the declaration were insufficient. The second count was submitted to the jury, and a verdict returned thereon in favor of the plaintiff. This verdict was subsequently set aside by the appellate court, and a new trial granted. Thereafter, in the trial court, the defendants moved to affirm the judgment as to the first and third counts, but the motion was denied, and plaintiff permitted to amend his declaration.

B. C. Moulton & V. J. Loring and E. D. Loring, for the defendant Pratt.

F. A. Perry, for the plaintiff.

⁵²¹ KNOWLTON, J. This case comes before us on an appeal from an order of the superior court overruling the defendant Pratt's demurrer to the declaration, on a bill of exceptions to the refusal of the court to order a judgment for the defendants upon the first and third counts, on the dismissal of the plaintiff's exceptions after the first trial, and on a bill of exceptions to certain rulings and refusals to rule at the last trial.

At the last trial the plaintiff waived his claim under all the counts, except the second and third, and the demurrer to these two counts is all that is material under the defendant Pratt's appeal. Since the former hearing of the case in this court (see *Holst v. Stewart*, 154 Mass. 445) the second count has been amended, and the defects in it which were then pointed out have been remedied. The objections which are principally urged against it in its ⁵²² present form are: 1. That the running of the railroad trains between North Stoughton and Boston was not a matter affecting the value of the farm so directly that it could be the subject of a fraudulent representation; and 2. That it was a subject in regard to which the plaintiff had ample opportunity to obtain information for himself, and that he had no right to rely on the representations of the defendants.

As to the first objection, it seems clear that the proximity of a dwelling-house to a railroad station in the vicinity of Boston is a matter which tends greatly to affect the value of the property. It is ordinarily one of the first subjects to attract the attention of a purchaser. The frequency of the arrival and departure of trains at different hours of the day

is as much to be considered as the existence of the railroad. We have no doubt that this was a matter which had such a relation to the value of the property that it might be the subject of a fraudulent representation.

The most difficult question in the case grows out of the fact that the subject of the misrepresentations was one of which the plaintiff easily might have obtained information from other sources. This question arises on the demurrer, and in a slightly different form on the bill of exceptions taken at the trial.

It has often been held, in general terms, that one bargaining with another must use reasonable diligence to discover for himself facts obvious to an ordinary observer, of which the means of knowledge are equally available to both parties. If he fails to do this he cannot maintain an action of deceit for the misrepresentation of them: *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Brown v. Leach*, 107 Mass. 364; *Poland v. Brownell*, 131 Mass. 138; 41 Am. Rep. 215. But, in the application of this rule, the circumstances of each case should be considered to determine whether the plaintiff has been guilty of such inexcusable negligence as should preclude him, under a general rule of public policy, from having a remedy against one who has fraudulently abused his confidence. It has been held that one may recover for false representations of facts which he could have ascertained by an examination of records in the registry of deeds: *Grimes v. Kimball*, 3 Allen, 518, 523; and that one buying a large number of carpets in a furnished house may take the seller's statement of their measurement, ⁵²³ although he could easily measure them for himself: *Lewis v. Jewell*, 151 Mass. 345; 21 Am. St. Rep. 454. Looking first at the demurrer, we are of opinion that the allegations of the second count are sufficient. It is charged that the defendants, to induce the plaintiff to purchase, falsely and fraudulently made these representations in regard to the running of trains, and that the plaintiff believed them to be true, and was thereby induced to purchase. It cannot be said that the times of the running of railroad trains is a matter so easily ascertainable by all persons, under all circumstances, that it can never be the subject of a fraudulent representation. The allegation is that it was made the subject of a fraud in this case. The circumstances are not set out in the declaration, and need not be. Moreover, it is alleged that the defendants were acting as agents

of the plaintiff, and in a relation of confidence the plaintiff would be warranted in relying on their assertions, when he would not be if they were representing only an adverse interest.

If we consider in this connection the exception taken at the trial to the refusal to direct a verdict for the defendants on this count, we find that the plaintiff was a native of Sweden, who spoke English imperfectly; that Pratt, one of the defendants, while they were in a railway-car waiting for the train to start for North Stoughton to look at the farm, undertook to find out for the plaintiff in regard to the running of trains, and went out of the car and got a time-table, and after his return looked at it, and made the false representations for which this action is brought. The testimony was that he professed to be reading from the time-table when he made the statement, and that when he had finished reading from it he put it in his pocket. It appeared that the plaintiff exchanged his real estate in Everett for this farm, and there was evidence that the defendants acted as his brokers in making the exchange, and that they were paid a commission by him for their services. Under these circumstances we cannot say, as matter of law, that the plaintiff was so careless in trusting Pratt that he should be precluded from recovering for the fraud practiced upon him in regard to the trains. We are of opinion that the ruling on the demurrer to this count and the rulings at the trial were correct.

The third count was in the ordinary form for money had and ⁵²⁴received, with a bill of particulars claiming for cash paid "by mistake and under misapprehension of facts at the time of the conveyance," etc. Under this count evidence might be introduced which would warrant a recovery, and in the absence of a motion for further particulars we are of opinion that the count was sufficient, and that the demurrer was rightly overruled: *Hayes v. Wilson*, 105 Mass. 21.

After the first trial, and before the last, the defendant Pratt took an exception to the refusal of the judge to "affirm the judgment of the superior court" upon the first and third counts, at the time of allowing his motion to dismiss the plaintiff's exceptions to the rulings on these counts, for failure to enter the exceptions in the supreme judicial court. The refusal was right. There was no judgment of the superior court to affirm. There was merely a ruling at the first trial that the plaintiff could not recover on these two counts, and

at the same time there was a verdict for the plaintiff on the second count, and a bill of exceptions filed by the defendants, which was afterwards sustained in this court. On the order for a new trial all matters were open, and the plaintiff availed himself of his right to file motions to amend his pleadings, and the motions were allowed.

There remain for consideration two or three questions raised by the exceptions taken at the last trial. It is now immaterial whether there was evidence to warrant the instruction given in regard to the possible combination or conspiracy of the defendants, for the jury found specially that they were partners, and they were therefore both holden for what was done by either of them in the transaction of the partnership business.

The defendants requested the court to rule that the action could not be maintained on the third count. But the bill of exceptions recites that there was evidence tending to prove this count, and nothing appears to show that there was error in submitting it to the jury: *Dana v. Kemble*, 17 Pick. 545; *Boston etc. R. R. Co. v. Dana*, 1 Gray, 83.

There appears to be an error in the return of the verdict for the plaintiff on both of these counts. One count was in contract and the other in tort, and they are alleged to be for the same cause of action. Counts in contract and in tort cannot be ⁵²⁵ joined in the same suit unless they are for the same cause of action. The jury should have been instructed that, if they found for the plaintiff on one count, they should find for the defendant on the other. The finding was for the plaintiff for two hundred dollars on each count. No motion appears to have been made, and no exception taken in regard to this error of the jury. If we interpret the record correctly, the plaintiff, as a condition of taking judgment on the finding, should be required to remit his verdict on one of these counts, and the judgment should then be rendered on the other. But as statements in different parts of the record are somewhat indefinite and confusing, we leave this part of the case for further proceedings in the superior court.

Exceptions overruled.

MISREPRESENTATIONS IN SALE OF LAND—ACTIONS FOR.—Any representation by the vendor of land in regard to a material fact, which operated as an inducement to the purchase, upon which the vendee had a right to rely, and by which he was deceived and injured, is actionable fraud: *Foster v. Kennedy*, 38 Ala. 359; 81 Am. Dec. 56, and note; *Williams v. Mc-*

Fadden, 23 Fla. 143; 11 Am. St. Rep. 345, and extended note; *Hexter v. Bast*, 125 Pa. St. 52; 11 Am. St. Rep. 874, and note; *Mitchell v. Zimmerman*, 4 Tex. 75; 51 Am. Dec. 717, and note. See, also, the notes to *Mooney v. Davis*, 13 Am. St. Rep. 43; *Lewark v. Carter*, 10 Am. St. Rep. 45, and *Durkin v. Cobleigh*, 32 Am. St. Rep. 441.

MISREPRESENTATIONS—WHEN NOT ACTIONABLE.—Deceit will not lie for false representations where the plaintiff by reasonable diligence could have informed himself of the truth of the matter: *Saunders v. Hallerman*, 2 Ired. 32; 37 Am. Dec. 404, and note; and had equal opportunity and means for ascertaining their truth or falsity: *Mamlock v. Fairbanks*, 46 Wis. 415; 32 Am. Rep. 716. See the extended note to *Ellis v. Andrews*, 15 Am. Rep. 383.

NEW TRIAL—EFFECT OF ORDER FOR.—A new trial reopens all the issues in the cause when asked and granted in general terms, though some of the issues were found in favor of the party asking for a new trial: *Foster v. Browning*, 4 R. I. 47; 67 Am. Dec. 505. Granting an order for a new trial on the motion of a defendant, who with other defendants is jointly and severally sued, vacates the former judgment, and operates as a new trial to all the defendants: *Gulf etc. Ry. Co. v. James*, 73 Tex. 12; 15 Am. St. Rep. 742.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

COHEA v. HEMINGWAY.

[71 MISSISSIPPI, 22.]

POWERS—EXECUTION OF.—DEED BY AN EXECUTOR having an individual interest in land, purporting to convey a complete title thereto, but making no reference to his representative character, or to a power to sell contained in the will, passes only his individual interest.

COTENANCY—PURCHASE OF TAX TITLE.—A cotenant, whether in or out of possession, cannot buy and hold a tax title against the other cotenants. Such purchase of a tax title merely extinguishes it for the benefit of all the cotenants, and the extent of the right of the purchaser is to charge its cost on the common property.

EJECTMENT. Perry Cohea died leaving an estate consisting partly of lands. He devised his estate by will, naming three executors, to whom he gave a power of sale. Two of these executors died, and the third resigned. In 1872 W. B. Jelks, one of the fifteen devisees under the will, was appointed administrator with the will annexed. On November 18, 1882, without an order of court, he sold and conveyed the land in dispute by warranty deed to W. L. Hemingway. This deed was signed by Jelks as grantor individually, without referring to the fact that he conveyed as administrator or under the power contained in the will. This land had been sold in March, 1882, to the state for the taxes of 1881, assessed to Jelks while he was in possession, and on July 25, 1883, after the period for redemption, the state sold the land to one Buckley, who, on December 14, 1883, conveyed it by quitclaim deed to Hemingway. On June 19, 1889, the heirs and devisees of Cohea, other than said Jelks, sued in eject-

ment to recover fourteen-fifteenths of said land. Judgment for the defendants, and plaintiffs appealed.

E. E. Baldwin, for the appellants.

Calhoon & Green, for the appellees.

²⁵ CAMPBELL, C. J. The conveyance to Hemingway by Jelks was not in execution ²⁶ of the power of sale he had as administrator *de bonis non cum testamento annexo* of Perry Cohea, and cannot be referred to that, for he had individually an interest in the land conveyed, and could and did convey that; and, as he made no reference in any way to his representative character, or executing the power he had in that capacity, his conveyance cannot be referred to or connected with that: *Yates v. Clark*, 56 Miss. 212.

By his purchase he became cotenant with fourteen others (plaintiffs), and in purchasing the tax title from Buckley merely extinguished it for the benefit of all the owners, and the extent of his right as to this is to charge the cost on the common property.

That he was not in possession does not make any difference. A co-owner, whether in or out of possession, may not buy and hold a tax title against other cotenants.

Reversed and remanded.

EXECUTORS AND ADMINISTRATORS—SALES BY—WHAT ESTATE PASSES.—A conveyance by an administrator which does not purport to convey any estate but his own is ineffectual to pass the interest or estate of his intestate: *Davenport v. Young*, 16 Ill. 548; 63 Am. Dec. 320, and note.

COTENANCY—PURCHASE OF TAX TITLE BY ONE COTENANT.—A purchase at a tax sale of the common property by one cotenant in the name of a third person inures to the benefit of all the cotenants: *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678, and note.

SCHOOLFIELD, HANAUER & Co. v. HIRSH.

[71 MISSISSIPPI, 55.]

ASSIGNMENTS — JUDGMENTS — NOTICE TO DEBTOR.—The assignment of a judgment is valid and effective to vest the title to it in the assignee, so as to defeat a subsequent garnishment of the judgment debtor by a creditor of the assignor having no notice of the assignment before service of the garnishment.

ASSIGNMENT OF JUDGMENT TO CREDITOR—ACCEPTANCE—EFFECT OF.—An assignment of a judgment to a creditor, in trust to pay himself and other creditors accepted by such creditor defeats a subsequent garnishment

of the debtor by a creditor of the assignor, although the garnishment is served prior to the assent of the other creditors to the assignment.

ASSIGNMENT IN TRUST—ACCEPTANCE.—An assignment in trust to a creditor to pay himself and other creditors, accepted by him, implies the assent of the other creditors, and their express acceptance of the assignment is unnecessary.

GARNISHMENT. Henrietta Hirsh obtained a judgment against the Louisville, New Orleans & Texas Railway Company, and the latter prosecuted an appeal therefrom. Pending the appeal, Schoolfield, Hanauer & Co. recovered a judgment against Mrs. Hirsh, and subsequently had a writ of garnishment sued out on their judgment and served upon the railroad company. Prior to the suing out of the garnishment, Mrs. Hirsh, being indebted to one Pohl and others in a greater amount than her judgment, assigned it to him, in trust to pay himself and the other creditors. Judgment in favor of Pohl, and Schoolfield, Hanauer & Co. appealed.

Johnston & Johnston and St. John Waddell, for the appellants.

Jayne & Watson, for the appellee.

57 CAMPBELL, C. J. All the questions in this case resolve themselves into two, the disposition of which will be decisive of the case, and render unnecessary any reference to the others. These questions are:

1. Is the assignment of a judgment valid and effective to vest the title to it in the assignee so as to defeat a garnishment of the judgment debtor by a creditor of the assignor, without notice to the garnishee of the assignment before service of the garnishment?

We have no hesitation to answer this in the affirmative, both on principle and authority. Notice may be important as to the garnishee or the claims of conflicting assignees, but a valid assignment unquestionably passes the title of the assignor without notice to the debtor, and, after assigning, the assignor has no interest to be reached by his creditor in any proceeding. As between rival claimants of what is in the hands of a garnishee, notice to the garnishee is not matter for inquiry. Their rights do not depend on notice. Except as affected by the registry laws a creditor can subject to 58 legal process only the interest of his debtor, and his debtor has no interest in a chose in action he assigned before seizure by legal process: *Oldham v. Ledbetter*, 1 How. (Miss.)

43; 26 Am. Dec. 690; *Byars v. Griffin*, 31 Miss. 603; *Moffatt v. Loughridge*, 51 Miss. 211. Many cases might be cited in support of this view, but it is needless.

A judgment is assignable, and the effect of assigning a judgment, so far as divesting the assignor of all interest, is the same as if the subject was something else.

2. The other question is, Was the judgment in favor of Mrs. Hirsh assigned in such effectual way as to defeat the right of the garnishing creditor? She had, before the garnishment of her judgment debtor by her creditor, assigned the judgment, by written transfer, to Theo. Pohl, one of her creditors, to pay him and others named in the assignment their several claims, which were specified, in consideration of their acceptance of the judgment, shared among them, in full of their several demands, which aggregated more than the judgment. Pohl received and accepted the transfer, but the other creditors, beneficiaries of it, are not shown to have signified their assent to it until some days afterwards, and after the service of the garnishment. The argument is, that the assent of the creditors provided for by the assignment was necessary to its validity, so as to defeat the intervening garnishment, on the established principle that two parties are necessary to a contract, and there must be *aggregatio mentium*, and the assent of the grantee to make a grant good; and *Hart v. Forbes*, 60 Miss. 745, and other cases in accord with it, are relied on as decisive of the case on this principle.

In these cases the transfer was to the creditor, who had no knowledge of it and was no party to it, and therefore did not assent until after the rights of others attached to the subject of the transfer, and the principle here invoked was applicable and decisive. But in this case the assignment was to one creditor for himself and others, and he accepted it and gave a valuable consideration for it, and became a trustee⁵⁹ for the others, who were immediately entitled to enforce the trust in their favor.

The assignment certainly vested the legal title of the judgment in Pohl, and that put it beyond the reach of garnishment at law; and, in a contest in a court of chancery between conflicting equities, the beneficiaries of the assignment being prior in time, would be prior in right to the garnishing creditor.

The cases which hold that assent of the assignee is necessary, before seizure under legal process, to defeat the creditor,

proceed on the proposition that, until such assent, the right to revoke the assignment is in the assignor; but Mrs. Hirsh did not have the right to revoke her assignment to Pohl after his acceptance of it for himself and others. Her right was gone. It was in Pohl, and beyond her control, and therefore beyond the reach of her creditor. It is true, if all the other beneficiaries besides Pohl had refused assent to the assignment, he would have been either owner of the judgment himself, or trustee for Mrs. Hirsh of the excess realized from the judgment beyond his claim; and he might, in such case, be garnished as her debtor, but no such case is presented. The other beneficiaries did not refuse assent. They had the right to signify assent within a reasonable time, and the trust created for them was not defeated or affected by the garnishment before they had given their assent.

The books make a wide distinction between a transfer directly to a creditor and one to a trustee for creditors. In the latter case the assent of the trustee, by acceptance of the trust, renders the assignment irrevocable. That fulfills the requirement of two parties and an agreement of minds, and the assent of the beneficiaries is not necessary to the validity of the assignment. It creates a trust, and they may assent and claim its enforcement after attachment, execution, or garnishment. This is the true doctrine, as we think, and it has abundant support: Burrill on Assignments, sec. 284, et seq.; Bump on Fraudulent Conveyances, 324, et seq.; *Oakley v. Hibbard*, 1 Pinn. 674; 44 Am. Dec. 426, 427; *Ingram v. Kirkpatrick*, 6 Ired. Eq. 463; 51 Am. Dec. 428; *Skipwith v. Cunningham*, 8 Leigh, 271; 31 Am. Dec. 642; *Brooks v. Marbury*, 11 Wheat. 78.

It seems also to be affirmed by most respectable courts in England and America that when an assignment is made, not to a stranger, a mere trustee, but to a creditor, in trust for others, that this makes the required assent of all to the assignment, or that no other assent than that of the creditor to whom the assignment is made is necessary: *Hastings v. Baldwin*, 17 Mass. 552; *Siggers v. Evans*, 32 Eng. Law & Eq. 139.

We think the assignment of Mrs. Hirsh to Pohl was effectual to vest in him the right to collect the judgment and carry out the assignment, and that the garnishing creditor has no right to the proceeds of the judgment, or any part of them.

The suggestion that the assignment was made for the very purpose of defeating the garnishing creditor, and therefore

that it is void, is unavailing. It matters not if it was. If Mrs. Hirsh chose to prefer her creditors, named as beneficiaries in the assignment, and made the assignment for the purpose of preventing the appropriation of the judgment by another creditor, she did nothing but what the law allows. That is just as allowable a mode of preferring creditors as any other.

Affirmed.

ASSIGNMENT OF JUDGMENTS—NECESSITY FOR NOTICE TO DEBTOR.—A judgment debtor, having no notice of the assignment of the judgment, is protected if he settles with his creditor, and is discharged from the debt: *Johnson v. Boice*, 40 La. Ann. 273; 8 Am. St. Rep. 528. Where a judgment creditor assigns a judgment, and the judgment debtor, without notice of the assignment, pays the amount thereof to the sheriff upon being served with garnishee process, the rights of the assignee are not affected: *Brown v. Ayres*, 33 Cal. 525; 91 Am. Dec. 655, and note. Third parties may purchase a judgment, and take an assignment of it with or without notice: *Mitchell v. Hockett*, 25 Cal. 538; 85 Am. Dec. 151, and note. A partial assignment of a judgment, without the consent of the judgment debtor, does not affect him: *Love v. Fairfield*, 13 Mo. 300; 53 Am. Dec. 148, and note. See, also, the notes to *Fisher v. Knox*, 53 Am. Dec. 507, and *Dugas v. Mathews*, 54 Am. Dec. 367.

TOLBERT v. STATE.

[71 MISSISSIPPI, 179.]

HOMICIDE—RESISTING ARREST.—A hostile demonstration of a purpose to use deadly weapons against an arresting posse by an escaped convict and his ally bearing arms, for the unlawful purpose of defying civil authority and preventing arrest justifies the killing of either of them. If, after such demonstration, they kill one of the arresting posse, they are both guilty of murder, irrespective of the question as to whether one or the other of them fired the fatal shot, or as to whether they or the posse fired the first shot.

JURORS—INCOMPETENCY—EFFECT ON VERDICT.—A mistake as to a juror, whereby one not competent and not drawn but summoned by mistake, having the same name, attended and was accepted and served on the jury at the trial, is not ground for setting aside the verdict. Such mistake does not impugn the fairness of the trial nor present a ground for a new trial.

INDICTMENT and trial for, and conviction of murder. The accused appealed.

J. R. McIntosh, for the appellants.

Frank Johnston, attorney general, for the state.

188 CAMPBELL, C. J. There were some immaterial errors committed by the court in its rulings on the admission of testimony, but they could not prejudice the cause of the defendants, and hence are not cause for reversal. The decisive question is as to the occurrences in connection with the killing of Cole, for which the defendants are on trial. The indisputable facts are that Tom Tolbert had been sentenced to the penitentiary for life, and, after being put in, had escaped and returned to his father's house in Kemper county, and was in the habit of going where he chose and meeting people of his acquaintance, and was usually, if not always, armed, and often with **189** both pistol and repeating rifle, and no effort was made to arrest him, although many months elapsed during which he enjoyed his liberty. He was sometimes attended by a brother, armed. The day before the killing of Cole he and his brother John were at an Indian's blacksmith-shop, and both were armed, when Mr. Donald encountered them, and shot and killed John, who had a repeating rifle, and shot at Tom, who shot at Donald. Just then the community was aroused, and the sheriff was sent for, and came into the vicinity. On his suggestion several citizens, assembled to render him assistance to arrest Tom Tolbert, went at early dawn of the next morning after John was killed, and placed themselves on two paths leading through woods away from the home of Tom's father, where he was supposed to be, two men being on one path and three on another. Soon the two Tolberts—Tom and Walter—came along the trail on which Cole, Cummings, and Harbour were watching, and the dog of the Tolberts barked at the men, when Tom and Walter, both armed—Walter with the repeating rifle and Tom with only a pistol, he says—immediately commenced firing, as the state's witnesses say, and made ready, and demanded to know "Who's there"? as the Tolberts say; and in the firing Cole was killed by a shot of one of the Tolberts. There was much shooting, and probably ten or twelve discharges of firearms. The testimony conflicts as to which party shot first, and as to the precise order of the exciting occasion; but it distinctly appears that the Tolberts were both well armed, and that, when the dog barked, shooting commenced very soon. It is a just inference that the Tolberts were on the alert, and had their weapons ready for instant use. It is true that no announcement was made to Tom by his would be captors that they had

come for him and wanted him, but it is reasonably certain that he had just ground to believe that he was the object of pursuit that morning, and, when he called to learn who was there, he was ready to open fire; and, whether he or Walter shot first, or the other parties did, ¹⁹⁰ is not very material, for it is not to be tolerated that an escaped felon, arrayed against organized society, defying civil authority, with arms in his hands to resist arrest, and with an armed ally in the person of another, shall be treated with the consideration due to citizens generally. It may not be allowable for any one finding him to shoot him down on sight; he may not be as Cain complained he was, liable to be slain by any one finding him, but, in his attitude, neither an officer nor citizen arresting him was bound to take any risk of being shot first. The very presence of Tolbert with arms and an armed attendant was an overt act, apparently threatening towards any seeking to arrest him, justifying killing him on the very slightest indication of a purpose to use his deadly weapons to prevent arrest. A citizen may bear arms for his defense against unwarranted attack. An escaped penitentiary convict has not the right to bear arms for the unlawful purpose of defying civil authority and preventing arrest; and, as all have legal authority to arrest him, his demonstration of purpose to use deadly weapons against captors justifies his being killed.

These observations apply to Tom, and, as Walter was with him on this occasion, armed, and afterwards fled with him, and was with him in his final surrender, still keeping his trusty rifle, and thus showing himself an ally of Tom, and warranting the belief that he was with him on the morning Cole was killed, to make common cause with him in resisting arrest, much as sympathy for Walter may be indulged for obeying his fraternal instinct and adhering to Tom, and sad as it is that a youth of nineteen years of age should be thus involved in crime and punishment as the consequence of espousing the cause of his older brother, we are not able to say that any distinction as to guilt can be drawn between Tom and Walter, while a great difference might be justly made as to the punishment of the two.

We think the verdict right upon the testimony, while we are far from being satisfied that the Tolberts fired first in the ¹⁹¹ melee in which Cole was killed. If they did not, as they were exhibiting deadly weapons, under the circum-

stances, the other parties were not required to wait, and had the right to shoot and kill them.

The mistake as to the juror Archer, whereby one not competent and not drawn, but summoned by mistake, as he had the same name, attended, and was accepted and served, is not ground for setting aside the verdict: Const. 1890, sec. 264. It is only where that occurs which impugns the fairness of the trial that a ground is presented for a new trial. While it is not surprising that the mistake as to the juror Archer was not discovered, under the peculiar circumstances so well calculated to mislead, it cannot be affirmed that it might not have been discovered by diligence before the jury was impaneled. The Archer drawn was an elderly man, fifty-eight years of age, and a well-known citizen. The Archer summoned, and who served, was a young man, and recently had moved into the county from another state; and it would seem that inquiry as to the Archer drawn, extending beyond his mere name, would have at once suggested that the young stranger who answered to the name when called was not the one drawn and inquired about; and on this ground the mistake was not cause for setting aside the verdict.

The right of a defendant is to have an impartial jury rather than one composed of particular persons; and where this right has been enjoyed, there is little cause for complaint, ordinarily, after verdict. An acquittal by such a jury would avail the defendant; and, having had a chance of escape at the hands of the jury, he should not be allowed to profit by an innocent mistake or inadvertence which in fact did him no harm.

The effort to show relationship between one of the jurors and Cole, who was killed, was a failure, which is all that need be said of that ground of complaint against the verdict.

We find in the record no ground for disturbing the conviction of both defendants, and the judgment is therefore affirmed.

HOMICIDE—RESISTING ARREST—RIGHT OF OFFICER TO KILL.—Where a defendant puts himself in armed resistance to an officer having a warrant for his arrest, and is slain by the officer in attempting to arrest him, without resorting to unnecessary force, the homicide is justifiable: *State v. Garrett*, 1 Winst. L. 144; 84 Am. Dec. 359, and note; extended note to *Hawkins v. Commonwealth*, 61 Am. Dec. 163; but the killing of a misdemeanant solely to prevent his escape is not justifiable: *Handley v. State*, 96 Ala. 48; 38 Am. St. Rep. 81, and note.

HOMICIDE.—KILLING AN OFFICER WHILE RESISTING ARREST IS MURDER if the party doing the killing had reasonable grounds to believe that the deceased was a peace officer: *Creighton v. Commonwealth*, 83 Ky. 142; 4 Am. St. Rep. 143, and note; *Croom v. State*, 85 Ga. 718; 21 Am. St. Rep. 179, and note; *Palmer v. People*, 138 Ill. 356; 32 Am. St. Rep. 146, and note. See, further, *Miller v. State*, 31 Tex. Cr. Rep. 609; 37 Am. St. Rep. 836, on homicide while resisting unlawful arrest, and *Weatherford v. State*, 31 Tex. Cr. Rep. 530, 37 Am. St. Rep. 828, on homicide while resisting arrest by a *de facto* officer.

CRIMINAL LAW—NEW TRIAL—DISQUALIFICATION OF JUROR.—Effect on verdict: See *Nomaque v. People*, Breese, 145; 12 Am. Dec. 157, and the note to *Rollins v. Ames*, 9 Am. Dec. 81.

SHIELDS v. THOMAS.

[71 MISSISSIPPI, 260.]

TRUSTS—TRACING FUNDS.—Although trust property may be followed by a court of equity through all its transmutations, whether its identity and individuality are preserved or merged in a mass of which it forms a part, the right to so follow it rests upon the equitable title of the beneficiary, who, seeking to recover specific property or to fix a charge upon a mass, must trace his estate, and show that the specific thing claimed is in equity his property, or that his estate has gone into, and remains in, the mass he seeks to charge.

TRUSTS—TRACING FUNDS IN HANDS OF RECEIVER.—No lien upon, or priority in, money in the hands of a receiver of an insolvent bank can be given for funds deposited therein before the insolvency, by a tax collector, in the absence of proof that the funds so deposited form any part of the money in the hands of the receiver, either in their original or transmuted form, or as a part of the mass of the assets of the bank.

Thomas & Griffin and J. H. Wynn, for the appellant.

Yerger & Percy, for the appellee.

264 COOPER, J. On December 22, A. D. 1891, the Bank of Greenville, doing business in Greenville, Washington county, closed its doors, and soon thereafter a receiver of its assets was appointed by the chancery court of Washington county. By an act approved February 10, 1892 (Laws 1892, p. 46), the district attorney of the fourth judicial district was directed to intervene and assert the claim of the state of Mississippi, of the county of Washington and of the board of levee commissioners of the Mississippi levee district to the sum of \$14,906.06, which sum had been deposited in said bank by the sheriff and tax collector of Washington county. In obedience to the direction 265 of that act the district attorney exhibited his petition in said chancery court, by which

he charged that "during the month of December, 1891, John L. Griffin, sheriff and tax collector of said county, had deposited \$14,906.06 to his credit as sheriff, of the funds collected by him from the taxes of the year 1891, for the state, county, and levee board, and at the date of the appointment of said receiver there was \$14,906.06 of said fund which had not been drawn out of said bank by said Griffin." The petition charges that the officers and managers of the bank knew of the character and ownership of the funds when the same were deposited, and that neither Griffin nor any one else could legally use the same in any other manner than to make payment thereof into the proper treasuries. Continuing, the petition charges that "said moneys are now in possession of said receiver, unless said bank had used the same prior to its suspension; that if the same are in the hands of said receiver, then said state, county, and levee board have the right to have the amounts respectively belonging to them set apart and paid to their respective officers authorized to receive the same; and, if said bank had used the same prior to its suspension, then said funds have gone into, and become a part of, the assets of said bank, and petitioners are informed and believe that said receiver has on hand more than \$15,000 in money and currency of the assets of said bank." The prayer of the petition is, that the court will direct the receiver to pay to the proper officers the sum so deposited by the sheriff and collector out of any moneys then in his hands, or that might thereafter be received by him, before paying any sums to the depositors or other creditors of the bank. To this petition the receiver pleaded that, "as said John L. Griffin, sheriff and tax collector, deposited in the bank of Greenville, from time to time, the various sums of money, which aggregated the total sum claimed—viz., \$14,906.06—the same was mingled with the other money on deposit in said bank, there having been up to the time of the suspension of said bank ²⁶⁶ over \$100,000 deposited therein, in addition to the deposits of said Griffin; that, when the bank suspended, there came into the hands of the receiver only the sum of \$368.70 in cash, and it is impossible to trace into the hands of the receiver any of the money deposited by the said John L. Griffin, either as constituting a part of the said sum of \$368.70, or as constituting any part of the assets of said bank received by the receiver." The plea was set for hear-

ing and sustained, and the petition dismissed, and the petitioner appeals.

There are decisions by several courts of authority sustaining the right of the petitioner to subject the fund in the hands of the receiver to the payment of the demand set up, in exclusion or postponement of the creditors of the bank, but, in our opinion, they are not sound in principle, and are departures from the well-settled course of decision. That there has been a development of the equitable rule of following trust property or money, and a consequent expansion of the right of the beneficiary, so that at this day relief would be afforded under circumstances in which it would formerly have been denied, is certainly true; but it is not true that the courts generally have abandoned the fundamental principle which controls in the application of the rule, and have substituted another and totally different one. In the cases cited by counsel for appellant the principle has been misapplied or overlooked; in some of them it is apparently abandoned.

“Formerly the right of following trust property depended upon the ability of identifying it, the equity attaching only to the property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge on ²⁶⁷ the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried”: Bradley, J., in *Frelinghuysen v. Nugent*, 36 Fed. Rep. 229.

Mr. Pomeroy says: “Equity regards the *cestui que trust* although without any legal title, and perhaps without any written evidence of interest, as the real owner, and entitled to all the rights and circumstances of such ownership. . . . No change in the form of the trust property, effected by the trustee, will impede the right of the beneficial owner to reach it and compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it cannot be specifically separated.” The principle which controls is that a court of equity is but lending its

aid to the real owner in reclaiming his own, and that, regardless of mere changes in the form of the property, the equitable title remains unimpaired so long as the *res* (in, whatever form it exists) may be traced, and that when identification is lost by confusion, it will give such relief as is practicable by creating a charge upon the mass for the value of the ascertainable, but inseparable, part of the same which belonged to the *cestui que trust*. Wherever, in the application of these rules, the right of the beneficial owner may be preserved, the jurisdiction of the court of chancery is supported by both principle and authority, and while, as we have said, there are cases to be found in which the mere reception and use of the trust fund by the owner of an estate has been held to be sufficient to warrant the court in fixing an equitable charge on the whole estate, these decisions are, in our opinion, not the law.

In *McLeod v. Evans*, 66 Wis. 401; 57 Am. Rep. 287; *Peak v. Ellicott*, 30 Kan. 156; 46 Am. Rep. 90; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722; 20 Am. St. Rep. 442; *Independent Dist. of Boyer v. King*, 80 Iowa, 497; *Harrison v. Smith*, 83 Mo. 210; 53 Am. Rep. 571; *Stoller v. Coates*, 88 Mo. 514; *Myers v. Board of Education*, 51 Kan. 87; 37 Am. St. Rep. 263; *Smith v. Combs*, 49 N. J. Eq. 420; *People v. City Bank*, 96 N. Y. 32, it seems to be held, though in some of the cases ²⁶⁸ not very clearly, that there is a sort of equitable charge upon the whole estate of a person who has converted or wasted trust funds. This doctrine apparently rests upon a presumption entertained by the courts which announced it, that the general estate would have been less than it was but for the use of the trust fund, and that an indirect and consequential melioration of the general estate subjects it to an equitable charge as though the trust fund was actually confused in but a part of it.

In *Smith v. Combs*, 49 N. J. Eq. 420, the vice-chancellor examined the facts tending to show that the trust fund could be traced into certain bank stock which the testator had on hand at the time of his death, and which passed into the hands of his executor. If the conclusion of the court had rested upon this fact, found to be proved, no question under any modern authority would exist as to the right of the *cestui que trust* to subject that specific stock to his demand. But the vice-chancellor proceeding, quotes from Lewin on Trusts as follows: "If a sole trustee dies insolvent and indebted to

the trust estate the personal representative of the trustee has a right of retainer in respect of the debt to the trust, as against other creditors, and, on the *cestui que trust* requiring him to exercise such right of retainer, he is bound to do so." If the learned chancellor had been considering the question of the right of the personal representative to retain for a debt due him, the extract from Lewin would have been appropriate, for Lewin, in support of his text, refers to *Sander v. Heathfield*, 19 L. R. Eq. Cas. 21, and *Crowder v. Stewart*, 16 Ch. Div. 368. An examination of these cases shows that the sole question involved in them was the right of retainer by the executor. In the latter case Malins, vice-chancellor, said: "I can only repeat what I said on a former occasion, and what almost every other judge has said—that the right of retainer is a relic of old law, not founded on justice, and working the greatest possible injustice." Now, in *Smith v. Combs*, 49 N. J. Eq. 420, the vice-chancellor, treating this extract from Lewin ²⁶⁹ as authority for following a trust fund, while it is not, proceeds to eulogize the principle as eminently equitable and just. The court of New Jersey is entitled to great respect because of its character and the ability of its members, and we note the misapplication of the rule of retainer in the opinion of the court, to show how easy it may be to establish a new principle by the inadvertence of distinguished judges.

The principle of following trust funds in equity is so fully discussed in *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, that it is unnecessary to cite any other English case to show the circumstances under which the jurisdiction is exercised in that country. The supreme court of the United States exhaustively considered the question in *National Bank v. Insurance Co.*, 104 U. S. 54, which case may be considered the leading American authority. The rule announced in these cases, as we understand it, is that trust property will be followed by a court of equity through all its transmutations and forms, and that whether its identity and individuality is preserved or is merged in a mass of which it forms a part, but that the right rests upon the equitable title of the beneficiary who, seeking to recover specific property or to fix a charge upon a mass, must trace his estate, and show that the specific thing claimed is in equity his property, or that his estate has gone into, and remains, in the mass he seeks to charge: *Peters v. Bain*, 133 U. S. 670; *Perry on Trusts*, sec.

836, 841, 843, and notes, where many English and American authorities are cited. See, also, 2 Pomeroy's Equity Jurisprudence, secs. 1048-1058.

The principle of following trust funds or property has been frequently applied, not only where the strict relation of trustee and *cestui que trust* exists, but also against other persons occupying the relation of a *quasi* trustee, and extends to many cases of mere fiduciaries; and, though the relation between the parties may not be of such character as to give the court of equity exclusive jurisdiction. In such instances the jurisdiction of equity seems to spring from the analogy to strict trusts and from the inadequacy of legal remedies: 1 Pomeroy's ²⁷⁰ Equity Jurisprudence, sec. 158. It has been held that money paid into bank to his own credit by an agent, partner, officer, or other fiduciary may be claimed and recovered in equity by the real owner: *National Bank v. Insurance Co.*, 104 U. S. 54; *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *Holmes v. Gilman*, 138 N. Y. 369; 34 Am. St. Rep. 463; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; *Myers v. Board of Education*, 51 Kan. 87; 37 Am. St. Rep. 263; *Independent Dist. etc. v. King*, 80 Iowa, 497.

As to the general assets of the Bank of Greenville, we think the petitioner is not entitled to relief upon the facts stated in the petition, because it is not shown that the funds deposited by the tax-collector now form a part thereof in any form. The record does not disclose to what purpose the fund was applied. For any thing that appears to the contrary, it may have been lost in trade, appropriated to the payment of pre-existing debts, or paid out to the agents and officers of the bank for services rendered, and what, if any, portion was so lost or applied could probably not be ascertained with any degree of certainty. The court, in attempting to determine what portion, if any, of the trust fund has been lost, and what yet remains as invested in and represented by the existing assets, would, from necessity, act upon mere conjecture. It may be that as to the small sum of \$368.70, which was found in the vaults of the bank, a different conclusion might have been reached if an issue had been taken on the plea instead of setting it for hearing on its sufficiency. The plea avers that "it is impossible to trace into the hands of the receiver any of the money deposited by John L. Griffin, either as constituting a part of the said sum of \$368.70 received by said receiver, or as constituting any part of the other assets of the bank

received by said receiver." By setting the pleas for hearing, the petitioner admitted the truth of the facts therein stated, and upon such facts the petitioner was not entitled to relief.

In *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, it was held that where a trust fund was traced into the personal ²⁷¹ bank account of the trustee checks drawn by him generally would be applied first to the disbursement of the fund which belonged to him, leaving the trust fund as the last item drawn against. Under this rule, it may be that a trust fund traced to the vaults of a bank would be presumed, *prima facie*, to remain as long as there was any money left therein; but it may also be true that the facts could be made otherwise to appear, in which case the presumption would be overturned. Giving to the plea its legitimate effect, it follows that all relief was properly denied to the petitioner, because it cannot be shown that the fund deposited by the tax-collector, or any part of it, is in the hands of the receiver, either in its original or transmuted forms, or as a part of the mass of the assets of the bank.

Decree affirmed.

IN the case of *Citizens' Bank v. Bank of Greenville*, 71 Miss. 271, it appeared that a party bought, sold, and shipped cotton, drawing his draft on the consignee in favor of the Bank of Greenville. The bank accepted such draft and agreed to pay his checks, drawn on itself, in favor of the parties from whom the cotton was purchased. The Citizens' Bank acquired one such check in due course of business, but instead of collecting it from the Bank of Greenville accepted a draft drawn by the latter on a New York bank. This draft was returned unpaid, the Bank of Greenville having in the mean time become insolvent. The supreme court decided that upon these facts the Citizens' Bank was not entitled to impress a trust in its favor upon the assets of the insolvent bank in the hands of a receiver, for the amount of the unpaid draft, nor was it entitled to charge the New York bank as trustee for that amount; that, instead of being entitled to any lien or priority for the amount of such unpaid draft, it stood on exactly the same footing as any other unsecured creditor of the insolvent bank.

EQUITY—TRACING TRUST FUNDS.—This question will be found thoroughly discussed in *Myers v. Board of Education*, 51 Kan. 87; 37 Am. St. Rep. 263; *Holmes v. Gilman*, 138 N. Y. 369; 34 Am. St. Rep. 463, and note; *Wetherell v. O'Brien*, 140 Ill. 146; 33 Am. St. Rep. 221, and note; *Union Nat. Bank v. Goetz*, 138 Ill. 127; 32 Am. St. Rep. 119, and extended note, and *Springfield Institution v. Copeland*, 160 Mass. 380; 39 Am. St. Rep. 489, and note.

NICHOLS v. SUN MUTUAL INSURANCE COMPANY.

[71 MISSISSIPPI, 826.]

INSURANCE—BUILDING FELLED BY CYCLONE.—Under a policy of insurance stipulating that if the insured building fall, except as the result of fire, the insurance shall immediately cease, the insurer is not liable for the loss of an insured building felled by cyclone, and destroyed by fire resulting from the fall.

ACTION to recover on a policy of fire insurance covering a stock of merchandise contained in a certain sound and well-constructed building felled by a cyclone. Immediately after the building was thus thrown down it took fire from lamps burning therein, and it, together with its contents, was totally destroyed. Judgment for the defendant, and plaintiff appealed.

Calvin Perkins, for the appellants.

F. A. Montgomery, Jr., L. P. Cooper, and Turley & Wright, for the appellee.

320 **CAMPBELL, C. J.** The judgment is right. The stipulation of the policy is unmistakable, to the effect that if a building fall, except as the result of fire, insurance was immediately to cease. The building fell, not as the result of fire, and fire broke out as the result of the fall of the building. Therefore, the insurer was not liable for the loss. "The fire did not produce the fall, but the fall produced the fire, and the destruction was by the former," etc: 2 May on Insurance, sec. 412; Ostrander on Fire Insurance, sec. 248; Wood on Fire Insurance, sec. 85; *Fireman's Fund Ins. Co. v. Congregation etc.*, 80 Ill. 558; *Liverpool etc. Ins. Co. v. Ende*, 65 Tex. 118, and other cases cited in the text-books.

Affirmed.

INSURANCE—CONDITION AGAINST "FALLEN" BUILDING.—Where a building was insured by a policy, conditioned to be void if the building should fall except by fire, the policy will not be avoided where the wall of part of the building fell, leaving more than two-thirds standing: *Breuner v. Liverpool etc. Ins. Co.*, 51 Cal. 101; 21 Am. Rep. 703. On the same point see *Huck v. Globe Ins. Co.*, 127 Mass. 306; 34 Am. Rep. 373, and note; *Dove v. Faneuil Hall Ins. Co.*, 127 Mass. 346; 34 Am. Rep. 384, and note; and *Transatlantic etc. Ins. Co. v. Dorsey*, 56 Md. 70; 40 Am. Rep. 403.

NIOLON v. McDONALD.

[71 MISSISSIPPI, 337.]

TRUSTEES—RIGHT TO COMPENSATION AND REIMBURSEMENT.—A trustee is entitled to reasonable compensation for executing a trust, without express agreement therefor, and also to reimbursement for any outlay made by him in the legitimate execution of the trust.

INJUNCTION. John M. Niolon and wife executed a trust deed on certain property, to secure a debt due to Hugh McDonald. The trust deed provided for a sale of the property upon default in payment of the debt, and that out of the proceeds of such sale the trustee should pay such debt, "and the expenses of executing the trust." Default was made in the payment of the debt, the trustee named declined to serve, and the beneficiary named G. Q. Hall as trustee, directing him to collect the debt. Hall advertised the property for sale, giving notice by posting and advertisement in a newspaper, for which he paid. Before the sale day Niolon paid part of the debt, and at his request the sale was postponed, to enable him to pay the remainder. He subsequently paid the balance due on the debt, but declined to pay an additional twenty-five dollars demanded by the trustee as compensation and costs of advertising the sale. Hall then readvertised the property for sale to pay the sum so demanded. The plaintiffs then filed a bill to enjoin the sale, and a temporary injunction was granted. Upon motion of Hall and McDonald the injunction was dissolved, and the plaintiffs appealed.

L. B. Moody, for the appellants.

Walker & Hall, for the appellees.

339 **COOPER, J.** No issue was made by the pleading touching the validity of the appointment of Hall as substituted trustee, nor that the amount claimed by him for his services as trustee was excessive, the position taken by complainant being that the trustee was entitled to nothing for his services, because he did not in fact make the sale under the deed. We therefore decline to consider and decide upon these points.

The English rule that a trustee is not entitled to compensation for executing a trust unless provided for by the parties, has not been accepted in the United States generally, nor in 340 this state. On the contrary, it is settled in this state

that he is entitled to reasonable compensation: *Shirley v. Shattuck*, 28 Miss. 13.

The trustee here had performed some service in the execution of the trust, and for this he was entitled to compensation. He had also paid out money for advertisement of the notices of sale in a newspaper, and since, by the terms of the deed, he was authorized to so advertise, clearly he was entitled to be repaid for this outlay.

Decree affirmed.

TRUSTEES—RIGHT TO COMPENSATION.—A trustee under a trust deed is entitled upon the close of his trust to a reasonable compensation for his services in performing his duties as trustee under the deed, to be fixed by the court, unless the parties can agree in relation thereto, and also to be reimbursed for all expenses incurred by him: *Moore v. Calkins*, 95 Cal. 435; 29 Am. St. Rep. 128, and note. This question is discussed at length in the monographic note to *Gibson's case*, 17 Am. Dec. 266.

WADDELL v. LATHAM.

[71 MISSISSIPPI, 351.]

VENDOR AND VENDEE—ACTION FOR PURCHASE PRICE—ESTOPPEL.—A vendee who goes into the possession of land under a warranty deed puts it of record, refuses to restore the *status quo*, occupies and leases the land for many years, and, when sued for the purchase price, alleges by sworn answer that he took possession under an executed contract and deed, delivered absolutely and unconditionally, is estopped from subsequently asserting that he went into possession under an executory contract, for the purpose of putting the burden of proof upon the vendor to show that when he sold the land he had a perfect title thereto.

VENDOR AND VENDEE—ACTION FOR PURCHASE PRICE—DEFECT IN TITLE.—A vendee who has gone into possession of land under an executed contract of sale is not compelled in equity to pay the purchase price, although he has not been evicted, if it appears that the title of the grantor is invalid, and that he is insolvent, but the vendee must clearly show the defect of title, and that, if sued, he cannot maintain his possession, and failing to show the invalidity of the title of the grantor, the latter is entitled to recover the purchase price.

BILL by T. H. Allen to enforce a lien for the purchase price of certain land. In 1886 Allen entered into negotiations to sell the land to B. B. Waddell for four thousand dollars on credit. The latter executed a note to the former for the sum named, payable five years after date, with six per cent interest, payable annually, and Allen executed a warranty deed to Waddell, reciting that the above-named con-

sideration had been paid. It was desired that the deed show no encumbrance for the purchase money, because Waddell wanted to negotiate a loan on the land. Nor was it intended that the deed should be delivered or recorded until such loan was procured and the purchase price paid. Waddell immediately took possession and began to cultivate the land, obtaining advances and supplies from Allen. Waddell obtained the deed from Allen for the purpose of examination of the title to the land, and found that Allen had no paper title and nothing to support his claim of title except adverse possession for more than ten years. For want of record title no money could be borrowed on the land, and soon afterward Allen became insolvent. Waddell then immediately put his deed on record, and on November 5, 1890, the present suit was filed. Waddell, by answer admitted the purchase, but denied that the delivery of the deed was conditional, and asserted that it was absolute. He also denied liability for the purchase money, because of the alleged defective title and Allen's insolvency, and by way of affirmative relief prayed that Allen be required to tender a deed conveying a perfect title before any decree was rendered for the purchase price. Latham Alexander and Company were substituted as complainants, they having become the assignees of the purchase money note. Judgment as prayed for in the bill, and Waddell appealed.

St. John Waddell, for the appellant.*

D. A. Scott, for the appellees.

355 COOPER, J. It is far too late for the appellant to set up the claim that he is a purchaser of the lands under an executory and not an executed contract. Doubtless that was the attitude it was intended for him to occupy, and when the deed was intrusted to him it was not intended to be delivered by the grantor. But the appellant put it to record; refused to restore the *status quo*, upon the ground that to do so would be an admission that the grantor had justly lost confidence in him; occupied and leased the land for many years, and finally, by his sworn answer and cross-bill, unequivocally asserted that the delivery of the deed was absolute and unconditional. Though what was done was not intended by the grantor as a delivery of the deed, he had the right to treat it as a delivery, by reason of the conduct of

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appellant, and to exhibit his bill to foreclose the lien for the purchase price. It suits the appellant now to occupy the inconsistent attitude of a purchaser under an executory contract for the reason that, if he can occupy this relation, it will devolve upon complainant the burden of proving that he has a good title to the lands sold before he can call on appellant to consummate the contract and pay the purchase price, but since appellant cannot now be treated otherwise than as a vendee in the undisturbed and undisputed possession of the ²⁵⁶ land, it devolves on him to show clearly the defect of title relied on by him. The grantor being confessedly insolvent, a court of equity will refuse to compel the grantee to pay the purchase price, although he has not been evicted, if it is made to appear that the title is invalid: *Johnson v. Jones*, 13 Smedes & M. 580; *Kilpatrick v. Dye*, 4 Smedes & M. 289; *McDonald v. Green*, 9 Smedes & M. 138; *Wailes v. Cooper*, 24 Miss. 208; *Gartman v. Jones*, 24 Miss. 234; *Miller v. Lamar*, 43 Miss. 383. But the defendant must clearly show the defect of title, and that if sued he cannot maintain his possession: *Moss v. Davidson*, 1 Smedes & M. 112; *Ayers v. Mitchell*, 3 Smedes & M. 683; *McDonald v. Green*, 9 Smedes & M. 138; *Green v. McDonald*, 13 Smedes & M. 445. The appellant failed to show the invalidity of the title of the grantor. At most, he has shown a title imperfect in written muniments, but supported by possession certainly sufficient in time, and probably in character, to cure all defects.

Counsel is mistaken in stating that the pleadings admit that by accident a part of the land intended to be conveyed was omitted from the deed, and that, without directing a correction of this error, the court has decreed a sale not only of the land described in the deed, but of that omitted.

The final decree directs the grantor to convey this land within twenty days from the date of the decree, and, in default thereof, that the clerk of the court, acting as commissioner, shall make the conveyance.

We find no error in the decree, and it is affirmed.

VENDOR AND PURCHASER—ACTION FOR PURCHASE MONEY—DEFENSES.—
A vendee in possession cannot defend against an action for the payment of the purchase money of the land: *Giles v. Williams*, 3 Ala. 316; 37 Am. Dec. 692. A vendee cannot resist the payment of purchase money while he retains the warranty bond and continues in possession of the land:

Lynch v. Baxter, 4 Tex. 431; 51 Am. Dec. 735. In *Gans v. Renshaw*, 2 Pa. St. 34, 44 Am. Dec. 152, it was held that the vendee in possession may resist an action for the purchase money without surrendering possession, if the vendor is unable to make title according to his agreement; and see the note to that case where the other cases in the series are collected.

PEARSON v. MILLER.

[71 MISSISSIPPI, 379.]

EXEMPTIONS—HOUSEHOLDER.—An unmarried man who holds and occupies one house as an office and sleeping apartment, while his grandfather, whom he supports, occupies a different dwelling furnished by himself, but owned by the former, who employs and pays a servant to care for his grandfather, all of the parties taking their meals at different places, is not a "householder having a family," so as to exempt his personal property from seizure under execution against him.

EXECUTION. Claim of exemption by an unmarried man, under the following statute: "Every person being a householder, and having a family residing in any city, town, or village, shall be entitled to hold, exempt from seizure or sale under execution, personal property, to be selected by him, not to exceed in value two hundred and fifty dollars." Judgment for the defendant, and the plaintiff appealed.

Stone & Lowrey, for the appellant.

W. D. Miller, for the appellee.

381 **WOODS, J.** A householder may be said to be a person owning or holding and occupying a house; and a family may be defined to be a collection of persons living together under one head. A householder having a family may be characterized as the head of a family occupying a house, and living together in one domestic establishment. He need not be a husband or a father, nor need the family over which he has headship and control be kept together as a unit continuously. The education of children, the illness of any member of the family requiring change of climate, or mere absence, however protracted, if only temporary, for pleasure or recreation, will not, of course, dissolve the family relationship or break up the household.

Applying these definitions and their obvious limitations to the facts contained in the record of the case at bar it seems clear to us that the appellant is not a householder having a family. He holds and occupies, as an office and

sleeping apartment, one house; his grandfather occupies another and distinct dwelling. The appellant owns this dwelling so occupied by the grandfather, and the grandfather owns its furnishings and furniture. The appellant employs the servant who lives with and cares for the grandfather, and supplies the table of the grandfather from a restaurant. The parties do not live together under the headship of the appellant as a collection of persons in one family; they occupy ³⁸³ different houses; they take their meals at separate places, and there is only the pleasing and natural care and attention bestowed upon the ancestor by the descendent which instinct and honor prompt to. It is the case of the kind and thoughtful offspring providing for the temporal wants of the aged and dependent progenitor in furnishing him a comfortable abode with table comforts, but it is nothing more. The appellant is not a householder, having a family dwelling in one domestic establishment, of which he has the headship and government.

Affirmed. .

EXECUTION—EXEMPTION—MEANING OF PHRASE “HEAD OF FAMILY.”—Exemption statutes apply only to the case of a housekeeper with family, and the family contemplated are those who reside with or compose the household of the debtor: *Seaton v. Marshall*, 6 Bush, 429; 99 Am. Dec. 683, and note. A widow keeping a boarding-house, with a female friend residing with her, and female servants, besides the boarders, is the head of a family: *Race v. Oldridge*, 90 Ill. 250; 32 Am. Rep. 27, and note. A “householder” is any head or chief of a domestic establishment, which he keeps together and provides for, but he need not be the actual occupant of a house: *Nelson v. State*, 57 Miss. 286; 34 Am. Rep. 444. A widow living with her father may be the head of a family if she have children depending upon her for support, although her father claims absolute control over the farm and house: *Backman v. Crawford*, 3 Humph. 213; 39 Am. Dec. 163, and note. See a full discussion of this question in the extended notes to *Rockwell v. Hubbell*, 45 Am. Dec. 254, and *Wade v. Jones*, 61 Am. Dec. 586.

LOUISVILLE, NEW ORLEANS AND TEXAS RAILWAY COMPANY v. WHITEHEAD.

[71 MISSISSIPPI, 451.]

WITNESSES—EXPERTS—CREDIBILITY.—An instruction that the evidence of expert witnesses is “to be received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous,” is fatally erroneous, for the reason that expert evidence is to be received and treated by the jury precisely as other testimony.

WITNESSES—EXPERT EVIDENCE—CREDIBILITY.—The weight to be given to expert evidence must be determined by the character, the capacity, the skill, the opportunities for observation, and the state of mind of the experts themselves, as seen, heard, and estimated by the jury, and by the nature of the case and all its developed facts.

Mayes & Harris, for the appellant.

Cassedy & Cassedy, for the appellee.

452 Woods, J. The first instruction given for appellee is justly obnoxious to the criticism of containing a comment on the testimony of the two chief witnesses for the appellant, and as charging the jury on the weight of the evidence. The jury was informed by the court that the evidence of these witnesses was to “be received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous,” etc. The singling out of the witnesses supposed to have been expert witnesses (whether they were or not it is unnecessary for us to determine) for discrediting remark by the court, and the unfavorably contrasting their evidence with the other evidence in the case, was in disregard of section 732 of the code of 1892.

The evidence of expert witnesses is to be received and 453 treated by the jury precisely as other testimony. Its value may be very great, or it may be of little worth. It may be conclusive, or it may be not even persuasive. Its weight will be determined by the character, the capacity, the skill, the opportunities for observation, and the state of mind of the experts themselves, as seen and heard and estimated by the jury, and, it should be added, by the nature of the case and all its developed facts: *Lawson on Expert and Opinion Evidence*, 240; *Humphries v. Johnson*, 20 Ind. 190; *Atchison etc. R. R. Co. v. Thul*, 32 Kan. 255; 49 Am. Rep. 484; *Thompson v. Ish*, 99 Mo. 160; *Carter v. Baker*, 1 Saw. 512; *Stone v. Chicago etc. Ry. Co.*, 66 Mich. 76.

Reversed.

WITNESSES — EXPERTS — CREDIBILITY. — Expert evidence should be received with great caution, and rejected by the jurors the same as the testimony of any other witness if, after due consideration, they deem it not well founded in fact: *Haight v. Vallet*, 89 Cal. 245; 23 Am. St. Rep. 465, and note. Medical testimony should be received with the utmost caution, and, unless sustained by reasons drawn from facts, is entitled to little weight: *Clark v. State*, 12 Ohio, 483; 40 Am. Dec. 481, and note; but in an ordinary case it is error to instruct the jury that medical testimony should be received and weighed with caution: *Atchison etc. R. R. Co. v. Thul*, 32 Kan. 255; 49 Am. Rep. 484. If a jury reach a conclusion from a consideration of the whole evidence, including that given by experts, they are not to surrender this conclusion because the opinions of experts do not coincide with theirs: *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65.

WITNESSES—WEIGHT TO BE GIVEN EXPERT TESTIMONY.—The value of the testimony an expert may give is for the jury, and depends upon the skill of the witness in his profession, the extent of which may be shown by one who speaks from knowledge: *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552; *Clark v. Fisher*, 1 Paige, 171; 19 Am. Dec. 402. An instruction is erroneous which says that "the jury in judging the weight of expert testimony should consider the character of the witness, and the interest, if any, he has in the case: *Duvall v. Kenton*, 127 Ind. 178. See, also, the extended note to *Hammond v. Woodman*, 66 Am. Dec. 228.

CRYER v. STATE.

[71 MISSISSIPPI, 467.]

MURDER—JOINT RESPONSIBILITY—ERRONEOUS INSTRUCTION.—On the trial of one of two persons charged with murder in resisting arrest, an instruction as to the joint responsibility of the one on trial for the acts of the other is irrelevant and erroneous when no conspiracy is established, and it appears that the one not on trial did not do the killing.

MURDER—MANSLAUGHTER—RESISTING UNLAWFUL ARREST.—One unlawfully sought to be arrested, who, without malice and to prevent such arrest, kills the party seeking to arrest him, is not guilty of murder, but of manslaughter only.

ARREST—WHEN UNLAWFUL.—An arrest sought to be made by an officer without a warrant, for a crime not committed in his presence, and when it is doubtful if any crime has been committed, is an unlawful arrest.

APPEAL from a conviction for murder. S. and E. Cryer were jointly indicted for the murder of one Robinson. S. Cryer was tried and found guilty on his separate trial. A dispute arose between the Cryers and one Young, and during the ensuing difficulty Young was severely wounded. A deputy sheriff was then sent for to arrest the two Cryers. He acted without a warrant, and on information alone. After arresting S. Cryer he deputized one Robinson to assist

him, giving the latter a gun, and placing S. Cryer in his charge. The sheriff then attempted to arrest E. Cryer, but was resisted, and, as S. Cryer was calling upon E. Cryer for assistance, the latter and the officer started to where S. Cryer was in the custody of Robinson. Before reaching that spot E. Cryer ran away, and the officer then attempted to fetter S. Cryer, and, while so engaged, E. Cryer came back, seized the gun in the hands of Robinson, and a struggle ensued between them for its possession. S. Cryer, having seized the sheriff from behind, the latter discharged his pistol at him from over his shoulder. Both of the Cryers then fled, and it was discovered that Robinson had been shot and killed. One witness testified that S. Cryer shot Robinson, but there was no evidence that E. Cryer fired a shot during the difficulty. The first instruction given by the trial court defined conspiracy, and declared the responsibility of conspirators for the acts of each other, done in the prosecution of the common design, and that if the two Cryers "combined, and acted in concert to resist arrest, and, on the execution of this design, S. Cryer shot and killed Robinson, both were guilty of murder."

J. H. Price and J. B. Sternberger, for the appellant.

Frank Johnston, attorney general, for the state.

470 COOPER, J. There is no suggestion in the evidence that Robinson was killed by Ephraim Cryer. Indeed, it is shown by all the testimony that he was not. So much of the first instruction for the state as relates to the responsibility of appellant for the act of Ephraim could only confuse the jury, and should not have been given. It had no relevancy to the issue.

The second instruction for the state is fatally erroneous. By law "an officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence, or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge made upon reasonable cause of the commission of a felony by the party proposed to be arrested. And, in all cases of arrests without warrant, the person making such arrest,

must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit": Code 1892, sec. 1375.

The officer making the arrest on the occasion of the homicide confessedly had no warrant; the evidence leaves it more than doubtful that any felony had been committed by any one, or that appellant "*et al.*" had been charged, upon reasonable cause, with the commission of a felony; and, confessedly, the offense for which the arrest was sought to be made was not committed in the presence of the officer.

The second instruction for the state informed the jury "that, if you believe from the evidence in this case, that the defendant shot and killed deceased at a time when deceased and others were trying to arrest defendant *et al.*, and that he, defendant, shot and killed him in order to prevent said arrest, the defendant is guilty as charged, and the jury should so find."

This instruction either tells the jury that the arrest sought ⁴⁷¹ to be made was a lawful arrest, and was therefore erroneous because upon the weight of evidence (Code, sec. 732), or instructed the jury that, if one unlawfully sought to be arrested resists, and kills the party seeking to arrest him, to prevent such arrest, and not in malice, he is guilty of murder. This is not the law, for the killing under such circumstances would be manslaughter, and not murder: Wharton on Homicide, secs. 225-271.

Judgment reversed, and a new trial awarded.

HOMICIDE—RESISTING UNLAWFUL ARREST.—A person may resist the attempt of another to enter his house for the purpose of illegally arresting him. If resistance by unlawful means, but without malice, results in the death of the assailant, it is manslaughter: *State v. Scheele*, 57 Conn. 307; 14 Am. St. Rep. 106, and note. An illegal arrest is deemed in law a great provocation, and, if conceded to constitute adequate cause, yet to reduce a killing in resisting such arrest to manslaughter, sudden passion must have existed in the mind of the slayer at the time of the homicide, otherwise the killing is murder: *Miller v. State*, 31 Tex. Cr. Rep. 609; 37 Am. St. Rep. 836, and note. See, also, the note to *Commonwealth v. Wright*, 35 Am. St. Rep. 485.

ARREST—WHEN UNLAWFUL.—An arrest without warrant for a misdemeanor by an officer of the peace who does not see the offense committed is illegal; nor will suspicion that the party has committed a misdemeanor on a previous occasion justify an arrest without warrant: *Pinkerton v. Verberg*, 78 Mich. 573; 18 Am. St. Rep. 473, and note. No arrest can be made for a misdemeanor unless by warrant upon complaint duly made, or by an officer or bystander who actually see the offense: *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 608, and note. An officer is a trespasser if he attempts to

make an arrest without a warrant when he is not authorized to do so: *Commonwealth v. Wright*, 158 Mass. 149; 35 Am. St. Rep. 475, and note, with the cases collected. See, also, *Filer v. Smith*, 96 Mich. 347; 35 Am. St. Rep. 603, and note.

HOMICIDE—JOINT LIABILITY.—In the absence of a conspiracy a mere presence when a homicide is committed by one person on another does not render the third person guilty, though he may be involved in a difficulty with others of the party of the deceased, unless he does some overt act with a view to the commission of the homicide, see *Weckreaver v. State*, 50 Ohio, St. 277; 40 Am. St. Rep. 667, and note.

POSTAL TELEGRAPH CABLE COMPANY v. ADAMS.

[71 MISSISSIPPI, 553.]

INTERSTATE COMMERCE—TAXATION OF FOREIGN TELEGRAPH COMPANY.—

A state tax imposed upon telegraph companies operating within the state, in lieu of all other taxes, as a privilege tax, its amount being graduated according to the amount and value of the property measured by miles, if reasonable in amount, and especially if less than the *ad valorem* state tax, is valid and not an interference with interstate commerce when imposed upon a foreign telegraph company operating its lines in and across the state, although such company is engaged in sending interstate messages.

R. S. Guernsey, Mordecai & Gadsden, and Brame & Alexander, for the appellant.

Williamson & Potter, for the appellee.

553 WOODS, J. This action was instituted by the revenue agent of the state for the recovery of a privilege tax alleged to be due by the appellant for the years 1888 and 1889, under section 585 of the code of 1880, and the amendment thereto contained in section 1, chapter 3, of the acts of 1888. Under the statute thus amended, among other 559 provisions, we find this language: "A tax on privileges is levied as follows, to wit: On each telegraph company operating one thousand miles or more, which shall be in lieu of other state, county, or municipal taxes, three thousand dollars; . . . on each telegraph company operating less than one thousand miles of wire, for each mile of wire, one dollar." The declaration alleges that the appellant operated, in the aggregate, during the years named, three hundred and ninety-one and twenty-eight one hundredths miles of wire in the state of Mississippi, and was, therefore, under the statute, liable for a tax of three hundred and ninety-one dollars and twenty-eight cents for each year named.

It will be thus seen at once that this is a tax imposed upon a telegraph company, in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed that it is in lieu of all other taxes, state, county, municipal. The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits, whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if its property had been subjected to a single *ad valorem* tax.

The pleas bring in question the validity of our statute, and aver its conflict with the interstate commerce clause of the constitution of the United States.

The record presents a federal question, and we acknowledge ourselves bound to follow the decisions of the court of last resort of the United States, if that court shall be found to have adjudicated it. Our difficulty arises from our inability to say with confidence what the supreme court of the United States has finally determined in cases of like character. The reported opinions of that court are so irreconcilable in their variances and seeming conflicts, in our view, that it is with diffidence that the impartial student can affirm what will or will not follow in any given state of case.

If the line of decisions adopted in *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Texas*, 105 U. S. 460; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489; *Leloup v. Port of Mobile*, 127 U. S. 640, and *Crutcher v. Kentucky*, 141 U. S. 47, stood alone, the settlement of the controversy in the case at bar would be made, without great difficulty, in accordance with the contention of the appellant. But the numerous other cases decided by the same great tribunal, in which was involved the same or like questions as are to be found in those just named, and in which contrary views seem to have been upheld, involves the controversy in much apparent, and, as we think, some real, difficulty. If we had for our guidance only the other line of decisions, embracing *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Osborne v. Mobile*, 16 Wall. 479; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; *Ficklin v. Shelby County Taxing Dist.*, 145 U. S. 1; *St. Louis v.*

Western Union Tel. Co., 148 U. S. 92, the right of the revenue agent of the state to maintain this suit successfully would seem to be well established in accordance with the views of counsel for appellee.

If from generalization we descend to detail the confusion that prevails in the decisions of the court whose lead we are bound to follow touching interstate commerce will be seen at once, and their confusion will deepen on protracted examination.

In the case of the *Western Union Tel. Co. v. Texas*, 105 U. S. 460, Mr. Chief Justice Waite, speaking for a unanimous court, said: "The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed, in a proper way, on account of its occupation and business." This very language of the ⁵⁶¹ then chief justice is quoted with approbation in *Telegraph Co. v. Massachusetts*, 125 U. S. 530, by Mr. Justice Miller, speaking for an undivided court. It is unqualifiedly declared in these two cases that the telegraph company, the agent of the government and engaged in interstate commerce, as held repeatedly in the court whose decisions we are reviewing, "may undoubtedly be taxed, in a proper way, on account of its occupation and its business."

But in *Leloup v. Port of Mobile*, 127 U. S. 640, as well as in other cases, Mr. Justice Bradley, speaking for the same united court, says: "Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a state can tax a business occupation when it cannot tax the business itself. . . . In *Western Union Tel. Co. v. Texas*, 105 U. S. 460, we decided that a state cannot lay a tax on the interstate business of a telegraph company, as it is interstate commerce. . . . In the present case, it is true, the tax is not laid upon individual messages, but it is laid on the occupation or the business of sending such messages. It comes plainly within the principle of the decisions lately made by this court in *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, and *Philadelphia etc. Steamship Co. v. Pennsylvania*, 122 U. S. 326." And this rule seems to be adopted in

one or two later cases. The conflict in the decisions on this point appears to be sharp and irreconcilable.

The case of *Osborne v. Mobile*, 16 Wall. 479, occupies a most unique position. In this case the court held that a privilege tax levied upon an express company having business intraterritorial as well as extraterritorial, was not invalid or repugnant to the interstate commerce clause of the federal constitution. In *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, the case of *Osborne v. Mobile*, 16 Wall. 479, was re-examined, and the correctness of its determination re-affirmed; and in *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, Mr. Chief Justice Waite and Mr. Justice Field and Mr. Justice Gray, in their dissenting opinion, refer to it as unchallenged authority. It has ⁵⁶² been quoted by Mr. Justice Bradley, in a dissenting opinion, as authority. But the judge last named, in delivering the opinion of the court in another case—the case of *Leloup v. Port of Mobile*, 127 U. S. 640—indulges the remark that the *Osborne* case would now be decided otherwise.

Again, in the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, it was held that the transportation of passengers and freight for hire by a steam ferry across the Delaware river, from New Jersey to Philadelphia, by a New Jersey corporation, is interstate commerce, and not subject to taxation by the state of Pennsylvania, while in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, the court holds that the state has the power to impose a license fee upon ferry-keepers living in the state for boats which they own and use in conveying, from a landing in the state, passengers and goods across a navigable river to a landing in another state.

Once more, *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Leloup v. Port of Mobile*, 127 U. S. 640, and *Norfolk etc. R. R. Co. v. Pennsylvania*, 136 U. S. 114, in no doubtful terms deny to the states the right to impose a license tax on any agency employed, even partially, in interstate commerce; but, on the other hand, *Telegraph Co. v. Massachusetts*, 125 U. S. 530, and *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, unmistakably uphold a tax imposed upon a railway company engaged partially in interstate commerce, for the privilege of exercising its franchise. It is true the amount of these privilege taxes is arrived at by the ascertainment of the earnings of the railway company within the state, and by the ascertainment of the valuation of the property within the

state, in the telegraph company case; but they are, by the very terms of the statutes of the two states imposing them, in the one case "an annual excise tax for the privilege of exercising its franchise in this state, which, with the tax provided for in section one, shall be in lieu of all taxes upon such railroad, its property and stock," and in the other "a tax upon its corporate franchises at a valuation ⁵⁶³ thereof equal to the aggregate value of the shares in its capital stock." In the case of the *Telegraph Co. v. Massachusetts*, 125 U. S. 530, it is to be observed that the tax was not upon the franchises of a domestic corporation, but upon those of a foreign one, the Western Union Telegraph Company, a New York corporation, and one employed in interstate commerce, and employed as a governmental agency also. It is no answer to the contention that these were privilege taxes, taxes upon the exercise of franchises, to assert that they were really taxes levied upon the property of the corporation. They are distinctly declared to be taxes on corporate franchises, taxes for the privilege of exercising corporate franchises, and the mere fact that the state adopted one method or another of fixing the amount of the tax is of no real value in the discussion. The question involved is not that of amount or method of ascertaining amount, but the validity of the tax itself, in any amount, ascertained in any way.

Are we mistaken in declaring that the decisions of the supreme court of the United States are not concordant on this most perplexing subject? We support ourselves in our perplexity by quoting the language of Mr. Justice Miller in *Fargo v. Michigan*, 121 U. S. 230. Speaking on this very subject, the learned judge said: "With reference to the utterances of this court, until within a very short time past, as to what constitutes commerce among the several states, and as to what enactments by the state legislature are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all the judges of the court who have written opinions for it may not have meant precisely the same thing." It appears to us that it is just and altogether decorous now to say that repeated and careful study of the decisions between 121 and 148 United States will warrant us also in asserting that the language employed by the court in the more recent cases of this character has not been the same, and that the judges who have written the later opinions have

⁵⁶⁴ not meant precisely the same thing. Unable, then, to say certainly what the judgment of the supreme court of the United States would be in the case in hand if presented to it, we feel at liberty to decide the controversy according to our own views of what is right on the facts disclosed—views not unannounced in that tribunal, whose final word is law.

This is the case of a foreign corporation admitted to the use and enjoyment of its corporate franchises in our state upon terms of perfect equality with all others. It is freely permitted to engage in the vast and varied employments connected with its business; it has the use and enjoyment of the country highways of the state, and the streets of our villages, towns, and cities, for the planting of its poles and the construction of its lines; and it has the care and protection of our laws and government. In return the state claims the right to treat it as she treats similar corporations chartered by her own authority. She asserts her authority to tax the exercise of its franchises in her midst as she does all others, domestic as well as foreign corporations. The state may tax its property as she does all other property, of persons or corporations, within her limits. She may tax the exercise of its franchises within her borders and under the sheltering protection of her laws and government, and no foreign corporation may arrogantly assume any superiority over her domestic corporations. The privilege tax, the tax on the business, the occupation, the tax on the exercise of franchises, may be incidentally burdensome to interstate commerce. It does affect the business somewhat and inevitably; but so does an *ad valorem* tax on the property employed in such commerce. It subtracts that much from the sum total engaged in the traffic. So does the tax on gross receipts, as in the case of *State Tax on Railway Gross Receipts*, 15 Wall. 284; so does the tax for the privilege of exercising its franchises by a railroad company in any state, ascertainable and determinable by the amount of its gross transportation receipts scaled as required in *Maine v. Grand* ⁵⁶⁵ *Trunk Ry. Co.*, 142 U. S. 217. Every tax is a burden, and, to the extent imposed, is an interference with the pursuit or business on which it is laid. If the business is partly interstate commerce, then that commerce is incidentally affected and interfered with by every tax, of any nature whatever, that may be levied on it.

In the case at bar there is no direct burden upon inter-

state commerce; there is no further interference with it than will be found necessarily to result from the imposition of any burden of taxation in any shape. For the use and occupation of the public roads of this state, for protection of its laws and government in the exercise of its franchises, and as its reasonable and proper contribution for the support of the government whose care and shelter it enjoys, the state has imposed a privilege tax, ascertainable and determinable by the number of miles of wire in this state, in lieu of all other taxes, and in an amount less than an *ad valorem* tax on its visible property would yield. The appellant is reasonably required to pay what is called a privilege tax, but it is a tax in lieu of all *ad valorem* and other taxes—state, county, and municipal—on property in this state. The state has chosen to impose a smaller burden than she might have done, unquestionably, if the property of the appellant had been subjected to the same rate of taxation as all other property whose *situs* is within her borders. By the imposition of a certain tax per mile on the lines wholly within her limits, the state secures from appellant that which appears certainly not to be a sum in excess of the amount which might have been imposed as an *ad valorem* tax. It seems to us that this position is supported by the opinions delivered and the results reached in *Osborne v. Mobile*, 16 Wall. 479; *Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; *Ficklin v. Shelby County Taxing Dist.*, 145 U. S. 1, and *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92, not to mention others that collaterally, yet powerfully, tend in the same direction.

In the case at bar there is no taxation of messages, interstate ⁵⁶⁶ and other; there is no exclusion, or attempted exclusion, by state law, of a governmental agency or a foreign corporation partially engaged in interstate commerce; there is no taxation which interferes with, interrupts, or burdens interstate commerce. There is a moderate, reasonable tax, called a privilege tax, but ascertainable and determinable by the amount, and necessarily by the value, of the appellant's property lying wholly in this state, imposed in lieu of all others; and this tax burdens and interferes with interstate commerce just as a tax on each telegraph pole does, as in the case of *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; or as a tax on corporate franchises whose value is ascertainable and determinable by value of the shares of capital stock propor-

tioned to the length of the telegraph lines in the state, as in *Telegraph Co. v. Massachusetts*, 125 U. S. 530; or as an annual tax for the privilege of exercising corporate franchises whose amount is to be determined by the gross transportation receipts, measured by the intrastate mileage compared with the total length of the railway within and without the state, as in *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217.

We adopt the language of Mr. Justice Miller in delivering the opinion of the court in *Western Union Tel. Co. v. Massachusetts*, 145 U. S. 530: "While the state could not interfere by any specific statute to prevent a corporation from placing its lines along their post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefits of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real and personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of another state, and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support,"⁵⁶⁷ and to this enlightened and just observation we unite the equally enlightened and just observation of Mr. Chief Justice Waite, in *Western Union Tel. Co. v. Texas*, 105 U. S. 460, quoted with approbation in the long subsequent case of *Telegraph Co. v. Massachusetts*, 127 U. S. 530: "The Western Union Telegraph Company, having accepted the restrictions and obligations of this provision by Congress, occupies in Texas the position of an instrument of foreign and interstate commerce, and of a government agent for the transmission of messages on public business. Its property in the state is subject to taxation the same as other property, and it may undoubtedly be taxed in a proper way on account of its occupation and business."

Affirmed.

INTERSTATE COMMERCE—STATE TAXATION.—This question is thoroughly treated in *Osborne v. State*, 33 Fla. 162; 39 Am. St. Rep. 99, and the cases collected in the note thereto, and in the monographic note to *People v. Wemple*, 27 Am. St. Rep. 558-564, and especially at page 559, where the taxation of telegraph companies doing an interstate commerce business is discussed.

ALCORN v. SADLER.

[71 MISSISSIPPI, 634.]

EASEMENT BY PRESCRIPTION.—One who, for twenty years, with the knowledge and assent of an adjoining owner, has been permitted to maintain and continue an adverse flow of water in a reservoir on the other's land by means of a dam, thereby acquires a prescriptive easement and right to maintain the dam at a certain height, and may enjoin an interference therewith.

EASEMENT BY PRESCRIPTION—INTERRUPTION.—A person is not deprived of a prescriptive easement to maintain water at a certain height by means of a dam maintained for twenty years, by the fact that he has from time to time strengthened the dam, and has occasionally let off the water at its outlet, these acts not being such an interruption of his enjoyment of the right as to break its continuity.

EASEMENT BY ADVERSE USER.—The period required to acquire an easement in land corresponds to the statute of limitations conferring title by adverse possession.

J. W. & W. D. Cutrer, for the appellant.

D. A. Scott and Calhoun & Green, for the appellee.

638 CAMPBELL, C. J. The report of this case, as presented on a former appeal and decided, is contained in 66 Miss. 221, where a full and accurate statement of the case, made by the bill and answer, prepared by the reporters, may be seen. The opinion of the court then delivered settled the principles of law applicable to the controversy, so far as it depended on the character of the body of water in dispute. The case was remanded for further investigation, and a vast mass of evidence has been accumulated, with the result of a decree authorizing Sadler to make his excavation so as to rid his land in the reservoir—called a cypress brake—of water put and kept on it by Alcorn's dam across the outlet at the mouth of Shep's bayou, but not to draw off the water, as it would be if the dam was not there. The decree recognizes and rests on the assumption 639 that the depression or reservoir constituted a natural body of water in its condition before the dam was constructed, and must be maintained to that extent, but that Sadler has the right to free his land from overflow caused by the dam.

Alcorn alone appealed from this decree, and complains, not of the ruling on which it rests as to the character of the collection of water, which accords with his contention, but that the decree denies his claim to the continued enjoyment of his collection of water by reason of his dam; and the only

question now presented for decision is as to Alcorn's right to maintain and continue the flow of water, caused by his dam, undisturbed by the drainage proposed by Sadler. For nearly or quite twenty years before this suit the dam has existed, and Alcorn, with the actual or presumed knowledge of Sadler, has exercised the privilege of flooding that part of Sadler's land embraced in the depression, or reservoir, with water, for the purpose of maintaining a certain height. This user by Alcorn has been adverse, exclusive, continuous, uninterrupted, open, and notorious, and, in fact, was known to Sadler from an early day, and, by this enjoyment, Alcorn has acquired an easement in Sadler's land covered thus by water, which cannot coexist with the right of Sadler to drain off the water so as to interfere with the right thus acquired by Alcorn.

It is not possible to fix with accuracy the year when the dam was last heightened, but there is no room for doubt that, some twenty years before this suit was begun the conditions as to increased water on Sadler's land were very much such as have continued ever since. The strengthening, or even heightening the dam, from time to time, would not affect the right to maintain the stage of water produced long enough ago to acquire an easement by lapse of time, and the occasionally letting off the water at the outlet, in the manner practiced by Alcorn, was not such interruption of his enjoyment of the right exercised to flow all the land in the reservoir ⁶⁴⁰ as to break its continuity, for that was *secundum subjectam materiam*. It is analogous to a right of way, which may be acquired by its use as such, without the necessity for being always on it.

Ten years is the time in this state by which to acquire an easement in land. It would be irrational to hold that an easement may not be acquired by the lapse of time to confer title to the land by adverse possession. The period for acquiring an easement in land corresponds to the local statute of limitations as to land: Goddard on Easements, 133; Washburne on Easements, 84 et seq.; *Horner v. Stillwell*, 35 N. J. L. 307, and cases cited; *Bonelli v. Blakemore*, 66 Miss. 136; 14 Am. St. Rep. 550; *Ryan v. Mississippi Valley etc. Ry. Co.*, 62 Miss. 162.

Lanier v. Booth, 50 Miss. 410, distinctly recognizes this rule. It does not decide that twenty years is the period for acquiring an easement by user, and would be clearly wrong if it did.

The suggestions of counsel for the appellee as to Alcorn's wrongful act in flooding Sadler's land, and his appeal to a court of chancery, improperly styled a "court of conscience," "to sanctify his wrong," is equally applicable to any right acquired by time and circumstances which make it effective to confer right, and cannot have any influence in the determination of the case. A right acquired by lapse of time is just as valid and available as any other.

The decree of the chancellor is reversed and vacated, and the injunction is perpetuated, and all costs of both the chancery court and this court are decreed to be paid by the appellee.

EASEMENTS BY ADVERSE USER—HOW OBTAINED.—When a party has enjoyed an easement for such length of time as to confer title to land from the true owner to the disseisor, this adverse enjoyment will establish the right to the easement as against the owner of the servient estate: *Pitman v. Boyce*, 111 Mo. 387; 33 Am. St. Rep. 536, and note, with the cases collected. To acquire a prescriptive right to an easement it must have been continually used and enjoyed during the whole time prescribed by the statute of limitations: *Totel v. Bonnefoy*, 123 Ill. 653; 5 Am. St. Rep. 570, and note.

EASEMENTS BY PRESCRIPTION TO FLOW LANDS.—An easement to flow back water upon lands is acquired by maintaining an embankment for twenty years: *Railway Co. v. Mossman*, 90 Tenn. 157; 25 Am. St. Rep. 670, and note, with the cases collected.

EASEMENTS BY PRESCRIPTION.—RIGHT OF MILLOWNER TO MAINTAIN DAM: See *Riverdale Park Co. v. Westcott*, 74 Md. 311; 28 Am. St. Rep. 249, and note.

PEVEY v. JONES.

[71 MISSISSIPPI, 647.]

PUBLIC LANDS—SALE BY PRIVATE PARTY—BREACH OF WARRANTY—LIMITATIONS.—If a private person conveys land owned by the United States, and warrants the title, the covenant of warranty is broken when made, and a right of action accrues thereon immediately, and the statute of limitation immediately begins to run against such cause of action.

PUBLIC LANDS—CONVEYANCE BY PRIVATE PARTY—BREACH OF WARRANTY—RIGHT OF ACTION.—A grantee by warranty deed executed by a private person to lands owned by the United States cannot take possession without becoming a wrongdoer, and is not required to take or attempt to take possession, and his right of action accrues immediately to recover for a breach of the warranty, not dependent on eviction or any future event.

ACTION brought on March 22, 1893, by the purchasers to recover on a covenant of warranty the purchase money paid

for land conveyed to them by warranty deed by the defendants on December 20, 1881. In 1890 the purchasers discovered that said land was owned by the United States. The defendants pleaded the statute of limitations of six years, and recovered judgment. The purchasers appealed.

P. Z. Jones, for the appellants.

Willing & Ramsey, for the appellees.

¶⁶⁴⁸ CAMPBELL, C. J. As to the land belonging to the United States, the covenant ¶⁶⁴⁹ of warranty was broken the instant it was made, and a right of action on it then accrued, and was barred when this action was commenced. The true doctrine is that the United States are always seised of their lands, and cannot be disseised as private owners may be; that land belonging to the United States cannot lawfully be the subject of sale and conveyance by individuals, so as to confer any right; that a grantee of such land by another than the United States cannot take possession without becoming a wrongdoer, and liable to summary ejection; and, therefore, that a covenant of warranty, in a conveyance of land belonging to the United States, must be viewed differently from one where the ownership is by a private person; that the grantee is not required to take possession, or attempt to get it, and that a right of action immediately accrues to recover for a breach of the warranty, not dependent on any future event, but fixed by the fact of ownership of the land by the government. In this case the grantee acquired nothing whatever as to the land owned by the United States; and, by virtue of the transaction, his vendor, on receipt of the purchase money, thereby at once became liable to him for money received to his use. We are not aware of any direct authority for this view, but it seems to result necessarily from what is well settled, and we do not hesitate to make a precedent so fully supported by reason.

The question involved here is not the same as that presented in *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360, in which the writer participated, and, as to the controverted question, in which he still entertains the view expressed in his dissenting opinion in that case.

Affirmed.

PUBLIC LANDS—RIGHTS OF SETTLERS.—Settlement on public lands confers no rights as against the government or its grantees: *Wells v. Pennington County*, 2 S. Dak. 1; 39 Am. St. Rep. 758, and note. A contract to sell

public lands before final proof is illegal and void: *Moffatt v. Bulson*, 96 Cal. 106; 81 Am. St. Rep. 192, and extended note; *Nichols v. Council*, 51 Ark. 26; 14 Am. St. Rep. 20. No title to, nor lien, nor privilege upon public land is conferred by or implied in a sale of improvements erected thereon independent of the rights conferred by the laws of the United States: *Ratcliff v. Bridger*, 1 Rob. 57; 36 Am. Dec. 683. An agreement with a settler on public land that in consideration of money advanced, for the purpose of purchasing it and paying costs and incidental expenses, the lender should have a lien upon the land to secure repayment thereof, is void: *McCue v. Smith*, 9 Minn. 252; 86 Am. Dec. 100, and note. See, also, the extended notes to *Tyler v. Green*, 87 Am. Dec. 132, and *Henry v. Welch*, 23 Am. Dec. 492.

SINGLETON v. STATE.

[71 MISSISSIPPI, 782.]

MURDER—FORMER CONVICTION NO BAR.—The fact that the accused is a convict under sentence of imprisonment for life for a former murder is no defense for a murder committed by him in prison while serving such sentence.

ATTAINDER.—PLEA OF AUTREFOIS ATTAINT, as a bar to a prosecution for another felony of the same grade, is not in force in the United States.

MURDER—EVIDENCE.—On a trial for murder a letter proved to be in the handwriting of the accused, though unsigned, expressing an intent to kill, and a motive therefor, and found at the place of the homicide a short time thereafter, is admissible in evidence against the prisoner.

MURDER—INSANITY—INSTRUCTIONS.—Without evidence suggesting a doubt of the sanity of a person on trial for murder, except the enormity of the crime, the court need not instruct the jury as to his sanity.

CONVICTION for murder, and sentence of capital punishment. Singleton had been convicted of another murder, and, while serving a life sentence therefor within the prison walls, killed one Lula Payne, another convict, and was indicted for her murder. He pleaded in abatement his former conviction and sentence, and that he was undergoing life imprisonment. A demurrer to the plea was sustained, and he was tried and convicted upon his plea of not guilty. Soon after the last killing there was found upon the ground near the place of the homicide a letter in the handwriting of the accused, but without signature or date, addressed to the warden of the prison in which he was confined. This letter read as follows, and was introduced in evidence over the objection of the defendant:

“Capt. M. L. Jenkins,

“SIR: You will please write to my cousin and tell him of my death and he has got fifty-one dollars and thirty-five

cents of my money, please collect it or get it from him & burrie Lula Payne and me deacon. I had rather not live any longer. My cousin has got my money he wont send it to me. I think that he has swindled me out of it. I have no friends to ever get me out of here. I am working turning a crank with a saw on it the work will kill any man that live, I know it will kill me. I got sick and unable last Saturday week to work. Mr. Lary fastened me up in my sell all day Saturday & Sunday because I was unable to work, he dont like me in the shop and Mr. McGee is trying to work me to death for spite, thats why I had rather die. I have been giving Lula every thing she wanted for six months and now she is flirting with the cook Taylor & her & I quarreled about it & she called the seargent to have me locked up & had rather die than to be locked up. I will send her off first then I will go after her, I will send her to hell shure then I will go. I rather be in hell than to be locked up or worked to death, come to the shop and try the crank saw that I am turning and you will see that I am working unreasonable I cant stand and no other man can, writ to my sister at Natchez & inform her of my death. Her name is Mary Singleton and you will oblige me, tell her that Poke has robbed me of my money that was left by my poor old father. Lula will never eat any more stake Taylor give you or write any notes."

On the trial counsel for the defendant asked the court to instruct the jury that it "should be satisfied beyond a reasonable doubt of defendant's sanity before convicting him; that if the evidence failed to satisfy the mind beyond a reasonable doubt that the accused knew right from wrong, or that he was committing a crime, he should be acquitted; that the burden of proof was on the state, and never shifted, and that defendant's soundness of mind was a material fact, to be established beyond a reasonable doubt; that, if a reasonable doubt of his sanity arose out of the evidence on either side, the jury should acquit." This instruction was refused.

M. M. McLeod, for the appellant.

Frank Johnston, attorney general, for the state.

187 CAMPBELL, C. J. The objection that the prisoner was not amenable for the murder committed while he was a convict under sentence of imprisonment for life for a former murder is without support in principle or practice here or elsewhere,

at the present time or in any former period of which we have any account. At a former day in England, because of the attainder consequent on conviction of felony, the doctrine was that a plea of *autrefois attain* was a bar to prosecution for another felony of the same grade, for the reason that "a second trial would be wholly superfluous. Where, therefore, any advantage, either to public justice or to private individuals, ⁷⁸⁸ would arise from a second prosecution, the plea will not prevent it, as where . . . the punishment will be more severe," etc: 1 Chitty's Criminal Law, 464; 4 Blackstone's Commentaries, 337; 2 Hale's Pleas of the Crown, c. 32; 2 Hawkins' Pleas of the Crown, c. 36.

The idea seemed to be that it was vain and useless to try a man already a convict, and to suffer the very same consequences as would follow a second conviction, but if public justice could be served by a severer punishment or a more extensive forfeiture, or otherwise, the plea of former attain was not good. Even when the plea was available in England, as stated, it would not have been good in the state of case here presented, and the courts would have repudiated the monstrous proposition that one sentenced for life was privileged to kill his fellow-men with impunity. Long ago the plea of former attain, as spoken of, was abolished by statute in England. It never was recognized in this country, so far as can be learned, except in Tennessee in 1827, as shown by the case of *Crenshaw v. State*, Mart. & Yerg. 122, 17 Am. Dec. 788, where it was held that a conviction, judgment, and execution upon one indictment for a felony not capital is a bar to all other indictments for felonies not capital committed previous to such conviction, judgment, and execution. Even that curious decision is not a precedent for the plea relied on in this case. In the remarkable opinion of Judge Catron in that case is an account of the case of one Stone, in England, who was hanged for murder, although he was attain for felony, and invoked that as a protection in the trial for murder. So it may be confidently affirmed that no adjudged case, and no statement by any text-book, can be found to sustain the plea in this case.

The plea of former attain, as formerly known in England, has been expressly repudiated in some cases (*State v. McCarty*, 1 Bay, 334, *Hawkins v. State*, 1 Port. 475, 27 Am. Dec. 641), and generally understood not to be admissible in this country. It could not be, for the reason that attainder and

corruption of blood, and the consequent forfeitures resulting from convictions ⁷⁸⁹ under the common law do not exist in this country, and cannot under the constitution, and therefore the supposed principles which sustained the plea of *autrefois attain* can have no application with us, which, strangely enough, was overlooked by the Tennessee court in the case cited. The learned author of Walker's American Law, a most valuable elementary book, says: "There cannot be, in this country, such a plea as a former attain, because there cannot be attainder": See page 693. In several standard works on criminal law no allusion is made to former attain as a plea to an indictment.

We have shown that, under the common law, the plea here relied on was unavailing, and that the common law as to former attain is not in force here. The question presented by the plea here is, whether a sentence to imprisonment for life licenses the convict to murder with impunity, and surely all must agree to a negative answer to this question. The idea that, because a convict is under many disabilities, he may commit crime as he has opportunity, without punishment, is untenable. If civilly dead he is corporeally alive, is under the protection of the law, and answerable for what he does, just as if under no denial of civil rights; and so it has been expressly held in cases just like this: *State v. Connell*, 49 Mo. 282; *Thomas v. People*, 67 N. Y. 218. If it had never been so held we would reject the monstrous proposition of immunity to a convicted felon from punishment for his after crimes, and hold him amenable for them as if he had not been convicted.

We see no error in admitting in evidence the letter proved to be in the handwriting of the prisoner, and we approve the refusal of the instructions asked by the prisoner. There is no evidence on which to base them. Nothing suggests a doubt of his sanity, unless it is the enormity of his crime, and it would be unsafe to indulge a presumption of a want of sanity from that alone, in view of the authoritative declaration that "the heart is deceitful above all things, and desperately ⁷⁹⁰ wicked; who can know it"? A long list of cases prove the wickedness of men in the commission of the most heinous crimes. The testimony of the prisoner himself furnishes a clue to explaining his terrible deed. It was prompted by jealousy, and "jealousy is the rage of a man; therefore he will not spare in the day of vengeance." We

are told that "love is strong as death; jealousy is cruel as the grave"; and, applying these sayings to the account given by the prisoner of his relations to the woman in the case, a solution is found of the horrible crime committed.

Affirmed.

CRIMINAL LAW.—NEITHER A CONVICTION NOR A PARDON for a particular offense can, in this state, operate as a bar or discharge any other distinct offense: *Hawkins v. State*, 1 Port. 475; 27 Am. Dec. 641. The question as to when a conviction bars other prosecutions is the subject of the extended note to *Crenshaw v. State*, 17 Am. Dec. 791; and on the same subject see the note to *Roberts v. State*, 58 Am. Dec. 547.

ATTAINDER.—CIVIL DEATH AND THE EXTENT TO WHICH IT IS RECOGNIZED IN AMERICA is the subject of the monographic note to *Avery v. Everett*, 6 Am. St. Rep. 379.

FERGUSON v. STATE.

[71 MISSISSIPPI, 305.]

SEDUCTION—INDICTMENT—EVIDENCE—CHASTITY.—In a criminal action for seduction the indictment need not aver, nor is it necessary to prove, primarily, the previous chastity of the female alleged to have been seduced, unless the statute makes her previous chaste character an ingredient in the offense.

SEDUCTION—SUFFICIENCY OF INDICTMENT.—The fact that an indictment for the seduction of a female under promise of marriage fails to distinctly and positively aver that she was unmarried at the time the offense was committed is not ground for setting aside a verdict of conviction when the indictment and evidence reasonably shows that the female seduced was unmarried.

SEDUCTION—PROMISE OF MARRIAGE.—On a trial for seduction, testimony by the prosecutrix that she first yielded her virtue to the accused because of his promise of marriage, and her reliance thereon, is admissible in evidence.

SEDUCTION—EVIDENCE OF INTERCOURSE—IMMATERIAL ERROR.—On a trial for seduction the admission of the testimony of the prosecutrix as to admitted acts of intercourse with the accused, and the birth of a child subsequent to the alleged seduction, though error, is not prejudicial to the accused, nor is it ground for setting aside a verdict of conviction.

SEDUCTION.—WHETHER THE ACCUSED WAS MARRIED OR UNMARRIED at the time the offense was committed is wholly immaterial in a prosecution for seduction.

SEDUCTION—CORROBORATION OF PROSECUTRIX.—The crime of seduction under promise of marriage cannot be established by the uncorroborated testimony of the prosecutrix, and she must be corroborated by other evidence as to the promise of marriage and the act of sexual intercourse, but the corroborating evidence need not support all the necessary elements of the crime.

Stone & Lowrey, for the appellant.

Frank Johnston, attorney general, for the state.

807 Woods, J. The action of the trial court in overruling the demurrer to the indictment is brought under review by the first assignment of error. The demurrer raises two questions, and we examine them in their order: 1. The indictment does not charge that the woman alleged to have been seduced was of previous chaste character; 2. The indictment does not charge that, at the time of the alleged seduction under promise of marriage, the woman was unmarried.

On the first proposition it is to be said that section 1298 of the code of 1892 prescribes the punishment for seduction of any woman or female child over the age of sixteen years, by means of pretended marriage or of false promise of marriage. The object is to protect the chastity of women and children above sixteen years of age (seductions in other cases being provided for in sections 1002, 1004) from attack by false marriages or false promises of marriage. The statute, *ex vi termini*, is to be confined to the abuse of unmarried females and unmarried females of previous chaste character. But the previous chastity of the female said to have been seduced need be neither alleged nor proved.

The presumptions of law spring from and rest upon the general knowledge and universal experience of mankind. In the multitudinous and varying ⁸⁰⁸ conditions and ranks of womanhood personal chastity is the rule; a lapse from virtue is the rare and painful exception. Until the rare exception has been proved, the legal presumption must prevail, and this legal presumption need be neither charged nor proved.

The adjudged cases and authorities holding the contrary view will be found, on critical examination, to stand on one or the other of two grounds, or on both, viz: The statutes creating and defining the crime of seduction in some of the states employ the words, "previous chaste character," or similar words, and so are supposed to require those words in indictments for such offenses. This fact appears in all, or nearly all, the reported cases which we have examined in which this identical question was passed upon. This is notably true of the early and unsatisfactory case of *West v. State*, 1 Wis. 186, *209, which is the foundation and perpetual reference of the later cases holding that chastity must

be alleged and proved. But in these later cases, which follow the early Wisconsin decision, we shall discover, on thorough inspection of the various statutes of the several states on which the indictments founded thereon were examined, and the sufficiency of their averments passed upon, that the words "previous chaste character," or other like ones, are uniformly to be found, as we now remember the results of our extensive and protracted research on this point. Said that eminent jurist, Cooley, J., speaking for the supreme court of Michigan, in *People v. Brewer*, 27 Mich. 134, commenting on the early Wisconsin case of *West v. State*, 1 Wis. 209, hereinbefore referred to: "The case of *West v. State*, 1 Wis. 217, . . . was decided upon the phraseology of the Wisconsin statute, which was thought to make the 'previous chaste character of the person seduced an ingredient in the offense. Our statute [Michigan] is very simple, and merely provides that 'if any man shall seduce and debauch any unmarried woman he shall be punished,' etc: Laws 1871, sec. 7697.

The Wisconsin court itself, in the opinion in *West's case*, ~~see~~ employs this language: "The previous chaste character of the female is one of the most essential elements of the offense, made so by the express words of the statute," etc. Bishop, in his works on Statutory Crimes, section 1106, and Criminal Procedure, volume 1, sections 647, 648, suggests, rather than declares, that the previous chaste character of the female seduced should be averred and proved in cases where these words are not in the statute. But the adjudged cases to which he refers as his authority for the suggestion do not support his text. The case of *People v. Roderigas*, 49 Cal. 9, is authority for the proposition involved in the Wisconsin case—*West v. State*, 1 Wis. 209—already adverted to, that when the statute creating and defining the crime makes the previous chaste character an essential ingredient in the offense, then it is necessary to charge and to prove this ingredient. In the case of *Roderigas* the indictment, which was demurred to, charged the prisoner with enticing an unmarried female to a house of ill-fame for the purposes of prostitution, without alleging that she was of previous chaste character. On an appeal from a judgment sustaining the demurrer the supreme court held the indictment insufficient, for failing to charge the previous chaste character of the female enticed to the disreputable house, the court saying:

“To entice a female into a house of ill-fame or elsewhere for the purposes of prostitution is not an offense under section 265 of the Penal Code, nor under the provisions of the act of March 1, 1872, unless such female was of previous chaste character.” By reference to the Penal Code of California and the act of March 1, 1872, of that state, it was, we find, made penal to entice a female of previous chaste character into a house of ill-fame. The decision rests upon the proposition that it was not the enticing to a house of ill-fame of any female which was made a felony, but only one of previous chaste character. The other case on which Bishop's text is supposed to rest is that of *West v. State*, 1 Wis. 186, *209, already examined.

Counsel for the accused also cite us to 21 American and English Encyclopedia ^{§10} of Law, 1046, and note 7. But this authority is content to observe that, “probably this averment [previous chaste character] must be made, even though the statute makes no mention of chastity, as that, as has been stated, is regarded by the courts as an essential feature of the offense.” The cases cited by the author in support of this qualified and guarded remark, and found in note 7, are *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17, *People v. Clark*, 33 Mich. 112, and *People v. Roderigas*, 49 Cal. 9. The last-named case, as we have already seen, is not support for the rule as guardedly announced by the American and English Encyclopedia of Law. The decision in that case was upon a statute which made penal the enticing of a female of previous chaste character into a house of ill-fame for the purpose of prostitution.

In *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17, the prisoner was indicted under a statute which made penal the “obtaining carnal knowledge of any female by virtue of any feigned or pretended marriage, or of any false or feigned promise of marriage.” The question on the indictment arose thus, as is stated in the opinion of the court: “The defendant moved in arrest of judgment, because the indictment only stated the parties were past the age of puberty, and did not state that they were of full age, and so able to make valid and binding promises to marry without consent of parents or guardians, nor even that they were of sufficient age to be capable in law of contracting marriage. This objection is frivolous. It thus appears that the necessity for the averment and proof of previous chaste character was not raised or passed upon

in any rulings in which that point was directly involved. It is worthy of remembrance, however, that, in considering the proper method of impeaching the previous chaste character of the female alleged to have been seduced, the court used this language: "Since, in the female sex, chastity is the rule and want of the exception the presumption is in favor of virtue. No evidence is required to establish it in the first instance, and the burden is on the defendant, if he would assail it, notwithstanding the presumption of his innocence." The remaining case cited in 21 American and English Encyclopedia of Law is that of *People v. Clark*, 33 Mich. 112. In this, as in the Arkansas case just referred to, the necessity for averring and making proof of previous chaste character is not raised or passed upon. The error of the editors of that most valuable work is all the more surprising in view of the following passage from the opinion of the court in *People v. Clark*, 33 Mich. 112, to wit: "The chastity of the female at the time of the alleged act is in all cases involved, and, the presumption of law being in favor of chastity, the defense have the right to show the contrary." It would appear to necessarily result, from what is said both in the Arkansas and Michigan cases, that the reverse of the guarded statement of the text of the editor of the encyclopedia is correct. If the previous chastity of the woman is a legal presumption no evidence need be offered to prove it primarily. And, if no evidence need be offered to prove it, its averment would seem to be unnecessary.

It remains to consider the other ground of contention on this point, which is that the previous chastity must be averred in the indictment and established in the evidence; otherwise the presumption of the defendant's innocence will be overthrown by the presumption of the woman's purity. To put it otherwise the strength of the presumption of the defendant's innocence cannot be weakened by any counter-presumption of womanly virtue. This same view was ably urged upon our attention in the case of *Hemingway v. State*, 68 Miss. 371. We need look no further than the opinion we then delivered in order to silence the present contention: "By this second proposition we suppose it is meant to be said that the presumption of innocence is affected or destroyed in part by the legal presumption of the correctness of the records, and that this favored presumption of innocence cannot be met by another presumption, but must be destroyed by

positive proof. This contention rests upon the ^{§12} unsubstantial ground that the general presumption of innocence is irrebuttable by any other and favored presumption. The rule is, in conflicting legal presumptions, the special and favored must prevail or take precedence over the general, and the practical operation of this rule we see constantly exemplified in trials for murder. In these trials for even capital offenses we shall constantly find the legal presumption of malice arising from the use of a deadly weapon, and we shall see the presumption taking precedence over the general presumption of innocence, in the absence of any other evidence showing circumstances of justification or excuse for the homicide. . . . But, after all, it remains to be said that . . . all that was done was to permit the jury to be informed that there was a legal presumption of the correctness of the official books, and, if this was not permissible, then it must be conceded that the presumption of innocence is irrebuttable by any other presumption—a proposition not to be tolerated in a court of law, for conflicting presumptions must always go to the jury as other conflicting evidence.”

There was no attempt to show any want of virtue in the unhappy girl in the case at bar before she fell a victim to the devilish lust of the prisoner. Undeniably he robbed his victim of the jewel of her virginal purity, and it is with scoundrelly grace only that he can invoke the vanished figment of the legal presumption of his innocence, insisting that the well-founded and universal presumption of maidenly modesty and womanly virtue shall be overlooked and denied the wretched creature whose character he has put to death.

As to the second ground of demurrer, it is sufficient to say that we are of opinion that the indictment reasonably shows that the female seduced was unmarried. It is to be regretted that the pleader did not distinctly and positively aver that the female was unmarried; but she is twice addressed by the prefix to her own proper name, which is solely and universally applied to an unmarried woman, and she is described ^{§12} as one to whom offers of marriage were falsely made—lawful marriage—and hence she is, by necessary inference, a female capable of contracting such marriage; that is, that she was marriageable, unmarried. The evidence, too, we see with surprise, is not direct and positive as to her state; but again, it reasonably appears that she was unmarried, for it is shown that she was a member of her father's household,

and living under parental control. She was uniformly addressed by the prefix to her name, used only in cases of unmarried females. She received from the prisoner such attentions as mark the courtship of the marriageable female by the man who would make her his wife; and she is called in the letters written her by the accused, "my girl, my love," etc., and he writes her: "I don't know when we will marry, but sometime, of course," etc. But one conclusion can be reached, on the averments of the indictment and on the evidence produced on trial, by an honest mind, and we shall refuse to hunt for or yield to mere technical rules of pleading and evidence, now happily growing less and less regarded by courts striving to administer substantial justice, where the pleading avers, and the evidence proves, with reasonable certainty that which a closer adherence to technical forms would have made stand out in bolder relief.

That the unfortunate girl was of previous chaste character the law presumes, and this legal presumption it was not incumbent upon the state to aver or prove primarily. We have no doubt from the pleading and the evidence that she was unmarried, and we are therefore of the opinion that the demurrer was properly overruled.

The second assignment of error draws in review the action of the court below in permitting the unhappy creature seduced to tell the jury that she yielded her person to her lover's embrace because of his promise of marriage, and her blind reliance thereon. We approve the action of the court, for, in the very nature of things, it will be impossible, generally, perhaps ever, to make this evidence if the ruined ⁸¹⁴ victim of the betrayer is forbidden to speak. As she alone knows, she cannot be held incompetent to communicate that knowledge to court and jury. We are aware that the authorities are not harmonious here, but reason and the preponderating weight of authority pronounce in favor of the righteousness of allowing the outraged and ruined female to testify that she fell because of the believed promise of marriage of her seducer: *Kenyon v. People*, 26 N. Y. 203; 84 Am. Dec. 177; *Armstrong v. People*, 70 N. Y. 38; *State v. Brinkhaus*, 34 Minn. 285.

The third assignment of error challenges the propriety of the trial courts permitting the female seduced to testify as to acts of sexual intercourse between herself and the prisoner, and as to the birth of her child subsequent to her seduction.

There was no controversy as to these facts. The repeated acts of sexual intercourse were testified to by the accused, and the birth of the child was not disputed. The evidence, we think, was incompetent, either as connecting accused with the crime of the seduction or as corroborating the evidence of the female seduced. But we are unable to see in what manner it could have excited the minds of the jury against the prisoner. Confessedly, after having first yielded her person to her betrayer, and after the revolting crime of her seduction had been accomplished, she had sexual intercourse many, many times with her seducer, and confessedly, also, the child afterwards born was not the fruit of the first intercourse had when she fell from the path of virtue. We can readily see how this might have prejudiced the victim, who thus continued to yield herself to his embraces, by causing the jury to pause and hesitate in determining whether she was the real owner of a previous chaste character when she took this alleged first step downward on the way to irretrievable shame. How it could have roused the feelings of a jury against the man we are at a loss to conceive. The error is not, in this case, reversible error.

On the fourth assignment it is necessary only to say that ^{§15} whether the accused was married or unmarried was wholly immaterial. If he was, in fact, unmarried, as he testifies, the fact was not improper to be shown to the jury, for it may have had power in facilitating his approaches to his object, and have been potential in moving his victim to listen to him, and, listening, yield.

The second instruction, of which complaint is made in the fifth assignment of error, is not open to the criticisms made by counsel. It does not authorize a conviction on the uncorroborated evidence of the woman seduced; it is silent on that point, but, more than once, and plainly, the jury was instructed that, in order to convict, the evidence of the woman seduced must be corroborated. This instruction is free from the fatal vice mistakenly supposed by counsel to inhere in it. By it the jury were informed that if their minds and consciences were satisfied by the evidence that the sexual intercourse was brought about by virtue of a promise of marriage made by defendant, before or at the time of the alleged intercourse, and that if this satisfaction of minds and consciences was produced by conscientious belief in the evidence, then the jury believed beyond all reasonable doubt, and they

should convict, although they might believe from the evidence, further, that the woman seduced afterwards (after her fall) yielded herself to the defendant's embraces to gratify her own passions—her own aroused and now uncontrolled passions—and was not now, since her seduction and fall from virtue, a woman of chaste character. Whether the unhappy wretch continued to wallow in the mire and filth of personal depravity, to which defendant's revolting villainy had reduced her, in no way affected his guilt or her previous purity, if these had been established satisfactorily.

The third instruction for the state is neither vague nor uncertain. By this charge the jury were simply informed, at the state's request, that corroboration of the testimony of the female seduced was necessary before conviction could be had. This was true, and if the accused desired to have defined ^{§16} the extent and reach of the general proposition contained in our statute that "the testimony of the female seduced, alone, shall not be sufficient to warrant a conviction," he should have asked supplementary and explanatory instructions, with ampler definitions of the general statement contained in the state's instruction now complained of.

The sixth assignment goes to the court's action in refusing certain charges for the defendant. The first instruction refused is clearly erroneous. The subsequent acts of intercourse it was sought to have the court tell the jury overcame the presumption of previous chaste character. This was not true in and of itself. The subsequent acts of sexual intercourse were matters to be carefully pondered by the jury, and their character and value were fair subjects for argumentation before the jury, but nothing more. To instruct the jury that these subsequent acts of illicit personal intercourse had overcome the legal presumption of the previous chaste character of the woman would have been to charge upon the weight of the evidence, and, in effect, take the case from the the jury.

The second, third, and fourth instructions refused were properly refused. The second instruction asked the court to direct the jury that it was the duty of the state to prove the character of the female seduced to have been chaste prior to the act of intercourse which accomplished her seduction. We have already seen that this is not sound. The third refused instruction is improper, because without evidence to support it. The fourth refused instruction is manifestly

erroneous, for the reason just given. It was unsupported by the evidence. There is no testimony, nor hint of evidence, that this seduced woman "had already fallen, and was not, at the time, pursuing the path of virtue," and the instruction which assumes as proved that which is not proved would be monstrous.

The fifth refused instruction was also properly rejected by the court below. By it the prisoner sought to have the jury advised that "all her testimony must be corroborated by ^{§17} other evidence upon every fact necessary to make out the crime." There is much diversity of opinion as to what extent this corroboration must go. There are cases in which it has been held sufficient corroboration of the female seduced if there was other evidence of the promise of marriage only. At the other extreme will be found cases holding that the corroborating evidence must support all the necessary elements in the constitution of the crime. The cases lying between these two classes announce the true rule, viz: The testimony of the female seduced must be corroborated by other evidence as to the promise of marriage and the act of sexual intercourse. The object of the law is to prevent the conviction of one accused on the unsupported testimony of one participating in the commission of the offense. As with the accomplice, so here corroboration to the extent of fairly tending to connect the accused with the commission of the offense, should be held sufficient. The female seduced appears on the witness-stand as *quasi particeps criminis*, and under a cloud. Whatever other evidence will fairly satisfy the jury that she is truthful and worthy of belief must be held sufficiently corroborative; and when she is supported as to the promise of marriage and the act of sexual intercourse—the two great fundamental essentials—the corroboration, we think, will be sufficient. In the case at bar the corroborative evidence (partly furnished by the defendant's evidence and by his letters) as to the act of intercourse and the promise of marriage is not wanting, and the jury has passed upon its worth and weight, and has, in our opinion, correctly estimated it.

We have here a fresh exemplification of the truth of the inspired maxim: "The way of the transgressor is hard." But if character is to be held safe from infamous attack, and the law for its security is to be maintained and honored, this

transgressor should be made to feel just punishment in all its fullness, and with inexorable certainty.

Affirmed.

S18 COOPER, J., specially concurring.

I concur in the result announced by my brother Woods, but I am not prepared to decide that our statute is applicable only in cases in which the female is of previous chaste character. It is true the codifiers have affixed to the statute the head-line "Seduction of female over age of sixteen by frauds," etc., which is perhaps evidence of their construction. It is also true that the statute declares that "the testimony of the female seduced alone shall not be sufficient to warrant a conviction." But the statute appears to me to include all cases in which carnal knowledge is obtained by the means named. It declares that "if any person shall obtain carnal knowledge of any woman, or female child over the age of sixteen years, by virtue of any feigned or pretended marriage, or any false or feigned promise of marriage, he shall, upon conviction, be imprisoned in the penitentiary not more than five years; but the testimony of the female seduced alone shall not be sufficient to warrant a conviction."

If the person indicted has, by the means condemned by the statute, obtained carnal knowledge of any woman, or female child over the age of sixteen years, he is, in my opinion, subject to conviction and punishment.

CAMPBELL, C. J., delivered the following opinion:

It is not my understanding that there is any difference of opinion among the members of the court as to section 1298 of the code of 1892, or the decision of this case. All agree that the indictment need not aver that the woman was of previous chaste character, and that it is not necessary to prove that she was. It seems clear that, if carnal knowledge was obtained of any woman, or female child over the age of sixteen years, by virtue of any feigned or pretended marriage, or any false or feigned promise of marriage, the fact that the woman had before yielded her person to another or others, however suggestive of her not having been deceived and misled by the accused, would not free him from the consequence of his act.

SEDUCTION—UNCHASTITY AS A DEFENSE.—A man may avail himself of the previous unchastity of a woman as a defense to an action for seduction: *Mrous v. State*, 31 Tex. Cr. Rep. 597; 37 Am. St. Rep. 834, and note; *State*

v. *Thornton*, 108 Mo. 640. In a prosecution for seduction the state must prove the good repute of the prosecutrix: *State v. Eckler*, 106 Mo. 585; 27 Am. St. Rep. 372, and note. See, also, the extended note to *Wearer v. Bachert*, 44 Am. Dec. 171.

SEDUCTION—UNMARRIED FEMALE.—Upon the prosecution of a defendant charged with seduction the fact that the prosecutrix was an "unmarried female" is an essential element of the crime: *People v. Krusick*, 93 Cal. 74. Where there is no evidence that the prosecutrix was an unmarried woman at the time of the alleged seduction a conviction will not be sustained: *State v. Wheeler*, 108 Mo. 658. See the extended note to *State v. Carron*, 87 Am. Dec. 405.

SEDUCTION UNDER PROMISE OF MARRIAGE.—Seduction by means of a promise to marry is committed if the man has carnal intercourse to which the woman's assent was obtained by a promise of marriage, made by the man at the time, and to which, without such promise, she would not have yielded: *Putnam v. State*, 29 Tex. App. 454; 25 Am. St. Rep. 738, and note, with the cases collected: *Cooper v. State*, 90 Ala. 641.

SEDUCTION—CORROBORATION OF PROSECUTRIX.—On a trial for seduction under promise of marriage the prosecutrix must be corroborated as to the promise by other evidence than that given by herself: *State v. McCasky*, 104 Mo. 644; and such corroboration must be to the same extent required of the principal witness in perjury: *State v. Primm*, 98 Mo. 368. The corroborative evidence need not be direct and positive, nor such as would be sufficient to convict independent of that of the prosecutrix, but simply such facts as tend to support her testimony and satisfy the jury that she is worthy of credit: *Wright v. State*, 31 Tex. Cr. Rep. 354; 37 Am. St. Rep. 822. To the same effect see *State v. Smith*, 84 Iowa, 522. In *Cooper v. State*, 90 Ala. 641, it was held that such corroborative evidence is not sufficient unless it is matter material to the issue, tends to connect the defendant with that material matter, and satisfies the jury that the woman has sworn truly: *Cooper v. State*, 90 Ala. 641. See the note to *State v. Reeves*, 10 Am. St. Rep. 356.

WILLIAMS v. BANK OF COMMERCE.

[71 MISSISSIPPI, 858.]

CORPORATIONS—CONTRACT ULTRA VIRES—DEFENSE.—A corporation having received benefits under a contract made by and with it cannot set up as a defense thereto that it had no power to do business in the state in which the contract was made.

CORPORATIONS—ULTRA VIRES AS DEFENSE.—Although a foreign corporation has entered into a contract in violation of a statute prohibiting it from doing business within the state, it cannot repudiate the contract under the plea of *ultra vires*, and retain the consideration received by it, especially when the other party is innocent and ignorant of the fact that the law has been violated. In such case the corporation may be compelled to restore and repay the consideration it has received.

INJUNCTIONS—SALES UNDER TRUST DEEDS—DAMAGES.—A statute allowing damages at a certain rate per cent on the dissolution of injunctions to stay sales under deeds of trust or mortgages with power of sale, such

damages to be added to the debt and collected by the sale of the property on execution, applies, whether the injunction is sued out by a party to the instrument or by a stranger. Such damages, when claimed and allowed by the court, are exclusive of all damages of any other nature.

Moore & Jones and T. B. Edgington, for the appellants.

C. Perkins, for the appellees.

§§§ COOPER, J. The appellants, who are creditors of the Fischer & Burnett Lumber Company, an incorporated company under the laws of this state, exhibited their bill in this cause in the chancery court of Bolivar county against the said Fischer & Burnett Lumber Company, and against the Bank of Commerce and the Continental National Bank of Memphis, Tennessee, and the Seaboard National Bank of New York, and against James A. Omberg and Charles F. M. Miles, and against other defendants who have no relation to the questions presented by this appeal. The purpose of the bill is to cancel as fraudulent certain deeds of trust executed by the Fischer & Burnett Lumber Company to Omberg and Miles to secure the payment of certain notes to the other above-named defendants, and to subject the property thereby conveyed to the payment of complainants' demands.

By the laws of the state of Tennessee corporations created under the laws of other states desiring to engage in business in that state are required, before engaging therein, to file a copy of its charter with the secretary of state, and also to §64 cause an abstract of the same to be recorded in the office of the register in the county in which it desires to carry on its business, or to acquire or own property, and it is made unlawful for any foreign corporation to do, or attempt to do, any business, or to own or acquire any property in that state, without having first complied with the provisions of the law, under a penalty of a fine of not less than one hundred nor more than five hundred dollars, at the discretion of the jury: Milliken & Ventrees' Laws of Tenn., secs. 1992-2003; Laws of 1891, p. 212.

The Fischer & Burnett Company, without having complied with the law of Tennessee, opened an office in the city of Memphis, in that state, and engaged in business there, in which business it contracted debts to the Bank of Commerce and to the Continental Bank. The debt to the Seaboard National Bank of New York originated by the Fischer & Burnett Company discounting its notes to that bank in the

city of New York, and it does not appear that this bank had any transactions with the company in the state of Tennessee other than that referred to in the next paragraph of this opinion.

On the 25th of May, 1893, the Fischer & Burnett Lumber Company, in the city of Memphis, executed its several promissory notes to the respective banks for the amount it owed each, those in favor of the Bank of Commerce and the Continental Bank being payable in Memphis, and that in favor of the Seaboard National Bank being payable at its banking-house in the city of New York; and, to secure the payment of said notes, it executed, at said time and place, a deed of trust to the defendants, Omberg and Miles, whereby a large quantity of real and personal property in the state of Mississippi was conveyed to said trustees, and power to sell said property in the state of Mississippi was conferred upon said trustees if default should be made in the payment of the notes it secured. After the execution of these notes and the deed of trust the creditors learned that ~~the~~ the Fischer & Burnett Company had not complied with the law of the state of Tennessee, by filing its charter with the secretary of state, and an abstract thereof with the register of Shelby county, in which county the city of Memphis is situated, and a doubt was entertained as to the validity of the notes and deed of trust. For the purpose of curing this supposed defect the proper officer of the Fischer & Burnett Company came to Lake Cormorant, in this state, and, on the twenty-seventh day of May, 1893, there executed and delivered other notes and a deed of trust of like tenor as those made in Memphis on the 25th of said month. Both deeds of trust were recorded in the proper offices in this state. On the third day of July, 1893, the complainants exhibited their original bill, seeking to cancel the deeds of trust as fraudulent, and afterwards, the trustees having advertised the lands for sale under the deed of date May 27th, a supplemental bill was filed by which an injunction was prayed and obtained against the sale. The defendants, in vacation, moved for a dissolution of the injunction on bill, answer, and exhibits, and, upon the hearing, the injunction was dissolved. On the hearing the defendants suggested damages. The chancellor found, as a fact that the value of the property covered by the deed of trust was \$30,000, it being of less value than the debts secured, and allowed damages as follows: 1. Attorney's fees, \$1,750;

2. For one day's services of trustee, Ailes, \$25; 3. For costs of readvertising property, \$55; 4. For services of night watchman to guard property during period of injunction, \$85; 5. Hotel bill of trustees, \$7.40. Total, \$1,922.40.

From the decree dissolving the injunction and allowing damages the complainants appeal.

The defendants asked the court to allow them damages of five per cent on the value of the property in addition to those allowed, and from the decree disallowing the same they prosecute a cross-appeal.

Upon the principal question it is contended by appellants ~~see~~ that the business transacted by the Fischer & Burnett Company in the state of Tennessee, without having complied with the laws of that state, was an unlawful business, made such by the terms of the statute, and that neither that company nor any one dealing with it, could acquire any rights by virtue of a contract entered into in the course of such business; that the creditors of the company, becoming such in dealing with it while engaged in an unlawful business, acquired no right by the contracts, nor could they recover from the company the sums advanced to it, suing not upon the contract, but for money *ex æquo et bono* due to them, wherefore they contend that the note and deed of trust executed at Lake Cormorant in this state were not supported by any consideration, and, because they were not, that the conveyance was a voluntary one, and therefore fraudulent as against the creditors of the company. It is further argued that since the notes to the Bank of Commerce and the Continental Bank, though made in Mississippi, were payable in Memphis, they are to be treated as contracts made in the state of Tennessee, and that the courts of this state should, through comity, consider them as void.

In the construction of statutes of the character of that of the state of Tennessee—i. e., statutes prohibiting or making unlawful an act, or declaring a penalty against it—the most conflicting conclusions have been reached by the courts of the various states, and sometimes by the same court, in reference to statutes apparently similar.

In *Bank of United States v. Owens*, 2 Pet. 527, the charter of the bank provided that "the bank shall not be at liberty to purchase any public debt whatever, nor shall it take more than at the rate of six per centum per annum for or upon its loans or discounts." A rate of discount exceeding six per

centum was reserved, and it was held that the contract was void, and no recovery could be had on the note.

In *Gold Min. Co. v. National Bank*, 96 U. S. 640, the bank had lent to the defendant more than one-tenth of its capital stock, in ⁸⁶⁷ violation of the twenty-ninth section of the act under which it was incorporated, and which declared that "the total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in." It was held that, though the plaintiff had violated its charter in making the loan, a recovery could be had.

In *National Bank v. Matthews*, 98 U. S. 621, it was held that, though the act under which the bank was incorporated prohibited it from accepting real estate as security for a loan to be made, yet that a mortgage executed to the bank in violation of the act was valid, and might be enforced by the bank; and to the same effect are *National Bank v. Whitney*, 103 U. S. 99, and *Fritts v. Palmer*, 132 U. S. 282.

It has been frequently held that the contracts of corporations made in states in which they were forbidden from doing business, or in violation of statutory provisions, were not enforceable at the suit of the corporation: *Springfield Bank v. Merrick*, 14 Mass. 322; *Bank of United States v. Owens*, 2 Pet. 527; *Williams v. Cheney*, 3 Gray, 215; *National etc. Ins. Co. v. Pursell*, 10 Allen, 231; *Cincinnati Mut. Health Assn. v. Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587. And also that the contract was void, and could not be enforced by an innocent party who contracted with the delinquent.

But, whatever view may be taken of the effect of a statute prohibiting a foreign corporation from doing business in a state upon contracts entered into against its provisions, it cannot be that the delinquent corporation may repudiate the contract and retain the consideration received by it, especially when the other party is innocent and ignorant of the fact that the law has been violated. It would be a reproach to the law if the Fischer & Burnett Company, having received over thirty thousand dollars of the money of the defendant banks under the circumstances disclosed by this record, could ⁸⁶⁸ plead its own default in defense of suits brought on its

contracts, and yet hold the money by reason of the contracts. If the contracts were invalid, and conferred no right of action on the banks, they gave no right to the company to hold the money, and, repudiating the contracts, the company, *ex æquo et bono*, was liable to repay the money it had received—liable not under or by virtue of the contracts, but by reason of the fact that, there being no valid contract, it had received money which in good conscience it could not retain. There is a wide and marked distinction between transactions of the character here involved and those involving moral turpitude, the mere making of which is detrimental to the public welfare or private morals.

In *Marble Co. v. Harvey*, 92 Tenn. 115, 36 Am. St. Rep. 71, it was held that the defense of *ultra vires* might be interposed by the corporation, although the contract had been fully executed by the other party. The court declined to pass upon the question of its liability, if sued upon a *quantum meruit*, because the question was not presented by the record, but it is evident from the opinion that approval is given to the authorities by which such right of recovery is upheld.

In *Ohio Life Ins. etc. Co. v. Merchants' Insurance etc. Co.*, 11 Humph. 1, 53 Am. Dec. 742, the precise question was involved and decided. The defendant, a corporation created by the state of Tennessee, had entered into contracts beyond its corporate power, and had received benefits therefrom. Being sued in equity, it defended upon the ground that it had no power to make the contracts. The court held that, while the defendant was not liable on the contracts, relief should be afforded to the complainant outside of them, saying: "We are of opinion, therefore, that the complainant is not repelled by reason of the illegality relied upon in defense, but is entitled to relief, and that in granting it the court will promote both the claims of private justice and the ends of public policy. It is to be observed, however, that the relief is against the contract and not upon the contract; for we ~~see~~ have seen that, in the nature of things, the law cannot enforce an illegal contract, although the parties be not *in pari delicto*. But it is consistent with itself that the law shall annul such contract, and place the parties in all respects *in statu quo*."

It is, therefore, evident that the Fischer & Burnett Company would have been liable to the banks if it had been sued

in the courts of Tennessee, not upon its contracts, but in an equitable action for the money it had received.

The notes and deed of trust executed by the company in this state were, therefore, fully supported by the consideration of the money it had received. We think it obvious that the validity of the notes secured by the deed of trust was not at all impaired by reason of the fact that they were made payable in the state of Tennessee: 1. Because in executing the notes in this state, payable in the state of Tennessee, the Fischer & Burnett Company were not doing business in the state of Tennessee; and 2. Because, if making the note had been doing business, it would have been only promising to do that which the courts of Tennessee would have compelled the company to do if suit had been brought there.

The court below properly dissolved the injunction.

The remaining questions for decision are presented by the appeal and cross-appeal from the decree allowing damages on the dissolution of the injunction.

Section 572 of the code of 1892 is as follows: "When an injunction, obtained to stay proceedings at law for money, shall be dissolved, in whole or in part, damages at the rate of five per centum shall be added to the judgment enjoined, or to so much thereof as shall be found due, including the costs; and the clerk of the chancery court shall certify such dissolution to the clerk of the court in which the judgment was rendered, who shall thereupon issue execution for the damages, as well as for the original debt and costs. Damages at the same rate shall be allowed upon the dissolution of injunctions to stay sales under deeds of trust or mortgages with ^{§70} power of sale; and such damages may be added to the debt and collected by the sale of the property, or execution may issue from the chancery court for the same, together with the costs of suit, unless the value of the property the sale of which was restrained be less than the amount of the debt, in which case the damages shall be computed on the value of the property, to be ascertained and determined by the chancellor; and in all cases, upon the dissolution of an injunction, the damages may be ascertained by the court or chancellor or upon a reference to a master, and proof, if necessary, and decree therefor be made and execution be issued thereon."

The chancellor was of opinion that the damages provided for by this law could be allowed only where an injunction was sued out by the defendant to a judgment, or the grantor

in a deed of trust or mortgage, being influenced by those parts of the section which provide that the damages allowed when the injunction was to stay proceedings at law should be added to the debt and collected by execution, and that those allowed upon dissolution of injunction to stay sales under deeds of trust or mortgages with power of sale "may be added to the debt and collected by the sale of the property."

The first clause of the section, we think, refers exclusively to injunctions sued out by a party to the judgment. There may be cases in which one not a party to a judgment may sue out an injunction to stay proceedings thereon, but we cannot now recall an instance in which it could be done. One not a party to a judgment may, by injunction, prevent his property from being subjected thereto, but this is not the stay of proceedings meant by the statute, for in such case the judgment is not stayed, but only a particular execution thereof.

But sales under deeds of trust or mortgages with power of sale may be, and frequently are, stayed by injunction by strangers to the deed, and the statute was enacted with reference to such injunctions, as well as those issued at the suit of a party to the instrument. Its terms are broad enough ^{§71} to include them, and the injury in either case to the creditor is the same. When the writ is issued at the suit of a party bound for the secured debt the damages given may be added to the debt and collected by the sale authorized by the deed. But they may also be collected by execution, and that may be awarded as well against a stranger as against a party to the conveyance.

The statute was intended to provide for and limit the damages allowable in the cases to which it applies. Ordinarily the injury sustained by the party interrupted in the collection of his debt consists of the delay occasioned and the costs incident to the defense of his cause. For such cases and for such injury the law has provided a fixed rule by which the damages may be ascertained, to wit: By giving a per centum certain of the collection which would have been made but for the issuance of the injunction. There may be cases, exceptional in their circumstances, in which, by reason of change in the condition of the property or the expense incident to its care and preservation during the pendency of the injunction, other and different damages should be allowed. But when one claims and receives the damages

allowed by the statute, he cannot receive, in addition thereto, other damages, to be ascertained by reference to other considerations. Those provided by the code are exclusive when allowed. We do not decide that one having a right to damages may, by his own choice, determine whether he will accept the damages fixed by the statute or will elect to have ascertained the real injury he has suffered. The statute, as we have said, was intended to provide fixed damages for those cases in which delay only is the injury sustained; and in such cases the defendant is confined to the damages it provides. Exceptional cases may arise to which the statute may not apply, and in these the actual damages sustained would be allowed; but in such instances the per centum given by the code would not be added to the sum awarded as actual damages.

873 The court should have allowed as damages five per cent on the value of the property, it being less than the debt secured. This value was found by the chancellor to be thirty thousand dollars, on which five per cent (fifteen hundred dollars) should have been allowed as the total sum to which the defendants were entitled.

The decree dissolving the injunction is sustained; the decree allowing damages is reversed, and a decree will be entered here for the sum of fifteen hundred dollars; costs of appeal to be divided equally between the parties.

Reversed, and decreed here.

CORPORATIONS.—WHEN ESTOPPEL ARISES AGAINST PLEADING THAT CONTRACT WAS ULTRA VIRES: See the notes to *Kennedy v. California Sav. Bank*, 40 Am. St. Rep. 72; *Linkauf v. Lombard*, 33 Am. St. Rep. 750; *Fidelity Ins. etc. Co. v. Western Pennsylvania etc. R. R. Co.*, 21 Am. St. Rep. 913; *Leavitt v. Palmer*, 51 Am. Dec. 341, and *New York etc. Ins. Co. v. Ely*, 13 Am. Dec. 108.

FOREIGN CORPORATIONS.—FAILURE TO COMPLY WITH LAW—ENFORCEMENT OF CONTRACTS AGAINST.—Though a foreign corporation has not registered, as it is required by law to do in a state where it enters into a contract, still such contract is valid and may be enforced against it: *Edison etc. Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370; 40 Am. St. Rep. 910, and note; and see also the notes to *Dudley v. Collier*, 13 Am. St. Rep. 60, and *Young v. South Tredegar Iron Co.*, 4 Am. St. Rep. 760.

HOME INSURANCE COMPANY v. SCALES.

[71 MISSISSIPPI, 976.]

APPELLATE PRACTICE—ERRORS NOT REVIEWABLE.—When it appears from the record that a trial was had finally upon the real grounds of controversy between the parties it is not the duty of the appellate court to review preliminary errors committed by the trial court in passing upon the pleadings presented in reaching the real points in contest.

INSURANCE—VACANT PREMISES.—An insured building is “unoccupied,” within the meaning of an insurance policy stipulating that it shall be void if the premises are “vacant and unoccupied” for a certain length of time, in a case where the tenant, who occupies the building as a store, closes and abandons it before the end of the term, leaving therein only a small amount of merchandise of nominal value, although he retains the key to the building at the request of the insured.

INSURANCE—VACANT PREMISES.—An insurer is not liable on a policy stipulating that it shall be void if the premises are vacant and unoccupied for a certain length of time, when they have been unoccupied for such period at the time of the fire, although the local insurance agent believed them to be occupied, but did nothing to mislead the insured.

INSURANCE—FORFEITURE—DUTY OF INSURER TO PREVENT.—It is not the duty of the insurer or his agent to keep a policy from becoming forfeited for violation of its conditions by the insured; nor is it the duty of such agent to notify the insured of the forfeiture when it occurs.

ACTION to recover on a policy of fire insurance on a building destroyed by fire on October 14, 1892, subsequent to the month of September mentioned in the opinion. The policy provided that it should be void if the insured building “should be or become vacant or unoccupied, and so remain for ten days.” Judgment for the plaintiff, and the defendant appealed.

Calhoon & Green, for the appellant.

Muldrow & Nash, for the appellee.

978 **CAMPBELL, C. J.** Where the action of the court upon the pleadings determines the controversy between the parties, or some feature of it, and so puts an end to it as to withdraw it from the jury, and eliminate it as a factor in the trial of issues of fact, this court should pass upon the action of the lower court on the pleadings; but where the matters involved in the altercations between the parties, however voluminous, and, though the judgment of the court be ever so often required and given, are afterwards litigated before a jury trying the case, this court, on appeal, will not perform the useless task of pronouncing *seriatim* on the various rulings made during the preparatory skirmishing between the combatants, but

will pass all by, and deal with the final engagement, and what was done in it. The only legitimate object of pleadings is to bring parties to an issue on the real grounds of controversy; and where this court, looking through the records, discovers that a trial was had finally on these grounds, it will not concern itself as to any errors committed in reaching the point of real contest. We have waded wearily through the ⁹⁷⁹ vast mass of preliminaries to the final battle in this case to ascertain that the declaration, with its four counts, the eight pleas, the numerous replications, the motions to make definite, motions to strike out allegations, rejoinders, surrejoinders, demurrers at almost every step, leaves to amend, and judgments as required by the successive steps, the record of which covers one hundred and sixty pages, all resulted in bringing the parties to trial of the only matters in dispute between them; and the question now is, not whether some slip was made in the hurry of a circuit court trial, and some error committed in deciding the multitude of questions there presented, but in the final contest, where every thing involved in the case was investigated, was any reversible error committed against the party found against?

The three matters in dispute are: 1. As to the title of the property insured; 2. As to the occupancy of the house; 3. As to proof of loss as required by the policy. The insurance company denied liability on the ground that there was a breach of warranty in the matter of title, and that the house insured was vacant or unoccupied, and so remained for ten days, in violation of the policy, and there was failure to make proof of loss as the contract required.

We have carefully considered the three matters of dispute, and, while we think neither the first nor third presents an insuperable obstacle to the maintenance of the recovery had, we cannot escape the conviction that the second does. The house was, unquestionably, unoccupied for more than ten days before the fire, and when it occurred. It matters not that Hibbler, the then local agent of the insurer, now testifies that he did not consider the house vacant or unoccupied, and that he would have issued another vacancy permit if he had thought it necessary. The house had been rented, and, when insured, was occupied by merchants. They moved out, abandoning the house as their store, in August. The house was found closed, and a vacancy permit for thirty days was, at the instance of the general agent, Kreth, issued by

*** Hibbler, the local agent, and delivered to Scales, who attached it to the policy. He was thus admonished of the fact of nonoccupancy, and of the course of business pursued in such case. The time for which the tenants at the time of the issuance of the policy rented expired September 1st. By that time some meat they had left in the house was sold and removed. They left a few empty molasses barrels, some old boxes and papers in the house, and they had the key—not surrendered to the agent of the owners, because he told them they could keep it until another tenant came. This was not such occupation of the house as the policy required, no matter what Hibbler or anybody else may have thought. If Hibbler knew the facts, and thought the house occupied, he was mistaken in his judgment of what was required to constitute occupation. Grant that his knowledge is imputable to the company, and the case is not altered. The company was not bound to notify the insured of the unoccupied condition of the house, if it actually knew it. Hibbler may have been under obligation to Scales, and he may have disregarded it, or erred in his judgment, and Scales may have cause of complaint against him, but, in all this, Hibbler was friend and agent, if at all, of Scales, and not of the company. If Hibbler, the agent, had done any thing in his capacity as agent, after the house was unoccupied, to mislead the insured, the case would be different, but nothing of that sort occurred. There was silence, and that is never ground for estoppel, except where it is a fraud, which cannot be predicated of this silence. The agent had a right to be silent, and give no notice as to the unoccupied condition of the house. It was no part of his business, as agent of the company, to keep policies from being avoided by violation of their conditions, whatever obligations he may have assumed by his engagement to the insured, as to which engagements he could not bind the insurer.

We feel safe in the assertion that no adjudication or declaration of a text-writer can be found to support the proposition ⁹⁸¹ that the house insured in this case was not “unoccupied,” so as to avoid the policy. We have searched in vain for any such utterance. There are many to the contrary: Richards on Insurance, sec. 150, and cases cited; 1 Biddle on Insurance, sec. 660, and citations; Ostrander on Insurance, sec. 143, and cases cited; Wood on Fire Insur-

ance, sec. 89, and cases cited; 1 May on Insurance, sec. 249 et seq., and references.

It may be regretted that careless inattention caused the policy to be forfeited, and, gratifying as it would be to us to be able to affirm the judgment in this case, we are constrained to order that it be reversed.

INSURANCE—VACANT AND UNOCCUPIED—VIOLATION OF CONDITION AGAINST.—A policy of insurance on a dwelling-house was conditioned to be void if the premises were unoccupied. The insured left the house and went to reside elsewhere, taking only part of her furniture with her. She left a man in possession with instructions to sleep in the house at night. The man quit the premises, and several days afterwards a fire occurred, no one being in the house at the time. It was held that the house was unoccupied and the policy void: *Cook v. Continental Ins. Co.*, 70 Mo. 610; 35 Am. Rep. 438, and note. Compare *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; 34 Am. Rep. 106. See the notes to *Weidert v. State Ins. Co.*, 20 Am. St. Rep. 826; *City Planing etc. Mill Co. v. Merchants' etc. Ins. Co.*, 16 Am. St. Rep. 556, and *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 890; and see, also, *Liverpool etc. Ins. Co. v. Buckstaff*, 38 Neb. 146; 41 Am. St. Rep. 724, and note.

CASES
IN THE
SUPREME COURT
OF
MISSOURI

FULLERTON v. FORDYCE.

[121 MISSOURI, 1.]

RECEIVERS HAVING THE EXCLUSIVE CONTROL AND CHARGE OF PROPERTY of a railway corporation, and of the management of its business, are bound to the same degree of care as the corporation itself would have been under the management of its board of directors, and are, in like manner, liable in their official character for injuries resulting from the negligence of themselves or their agents and employees.

RECEIVERS, ACTIONS AGAINST FOR NEGLIGENCE.—By the act of Congress of March 8, 1887 every receiver may be sued in respect to any act or transaction of his in carrying on the business, without the previous leave of the court in which he was appointed. This includes actions for the negligence of the receiver or of his employees or agents.

PERSONAL EXAMINATION OF A PARTY TO THE ACTION—DISCRETION OF THE COURT.—The ordering of personal examination of a party to an action is within the discretion of the court, and its refusal to make such order should not be interfered with, unless its discretion was clearly abused.

EVERY CARRIER OF PASSENGERS OWES THEM THE DUTY TO KEEP ITS STATION platforms in a reasonably safe condition, and is liable to persons, who are themselves duly careful, for damages sustained by reason of its negligence in not observing these duties.

CARRIERS OF PASSENGERS.—A PASSENGER LEAVING A TRAIN HAS A RIGHT TO ASSUME that he can safely pass across a depot platform to take conveyance to his destination, and is not guilty of contributory negligence in assuming that such platform is reasonably safe and convenient for his use.

A CARRIER OF PASSENGERS IS GUILTY OF GROSS NEGLIGENCE in allowing a hole, eight inches wide and six feet long, to remain in the floor of a passenger depot platform four days after knowledge thereof. The question of negligence, therefore, in such a case need not be submitted to the jury.

JURY TRIAL.—AN INSTRUCTION ASSUMING that the plaintiff in an action for personal injuries was injured in his hip and spine, when there is a conflict of evidence as to such injuries, is insufficient, and a verdict so large that it apparently resulted from a consideration of these injuries will be set aside.

Sam H. West, for the appellants.

Wilson Cramer, for the respondent.

¶ **MACFARLANE, J.** This is a suit prosecuted by plaintiff against the receivers of the St. Louis, Arkansas & Texas Railway Company, appointed by a United States circuit court, to recover damages for injuries received by reason of falling into a hole in the depot platform of said company at New Madrid, Missouri. Plaintiff charged defendants with negligence in not keeping its platform in a reasonably safe condition, by reason of which, on leaving a train at said station, upon which he had been a passenger, he was precipitated^s into the hole in the platform, and was thereby injured.

It appeared from the evidence that the platform was about four feet above the ground, and from which one plank about six feet long and eight inches wide had been broken out. The agents of defendants testified that the plank had been broken by one of themselves, in moving a heavy box of goods, at least four days before the injury. Other evidence tended to prove that it had been out as long as two weeks. Plaintiff arrived on the train in the night-time, neither the station nor the platform being lighted, and, after leaving the cars, walked across the platform to take a hack to a hotel, and not knowing of the hole, and being unable to see it, he fell therein, by which he received the injuries for which he sued.

Defendant objected, in a proper manner, to the sufficiency of the petition. The grounds of the objection were that it nowhere appeared from the petition that plaintiff had leave, from the court appointing the receiver, to prosecute the action; and that the receivers were not liable, officially, for neglect in keeping the platform in repair unless authorized by the court to do so, which authority should appear from an averment in the petition. These objections were overruled. Objection was made to the ruling of the court in refusing to require plaintiff to submit to an examination by physicians, and to the giving of certain instructions. The other facts

necessary to an understanding of the points discussed will sufficiently appear in the opinion. The verdict and judgment were for plaintiff for fifteen thousand dollars, and defendants appealed.

1. Receivers who have exclusive charge and control of the property belonging to a railroad company, and of the management of its business, are bound to the same degree of care as the corporation itself would have been under the management of its board of directors,⁹ and are in like manner liable, in their official character, for injuries resulting from the negligence of themselves or their agents and employees. "Being actually engaged in business, justice to those with whom they deal demands that they shall be held to the same accountability whether their liabilities arise in contract or in tort": Beach on Receivers, sec. 717; *Little v. Dusenberry*, 46 N. J. L. 614; 50 Am. Rep. 445; High on Receivers, sec. 395; 2 Rorer on Railways, 898.

2. Previous to the act of Congress of March 3, 1887, the generally accepted doctrine was that an action could not be maintained against a receiver, except by leave of the court wherein the receiver was appointed. That act declares that "Every receiver . . . may be sued in respect of any act or transaction of his, in carrying on the business connected with such property without the previous leave of the court in which said receiver or manager was appointed." The language of this statute is broad enough to include actions growing out of the negligence of the receiver, or his agents or servants. So it has been held by the supreme court of the United States that such suits are within the contemplation of said act: *Texas etc. Pac. Ry. v. Cox*, 145 U. S. 601; *McNulta v. Lochridge*, 141 U. S. 327.

3. After plaintiff had concluded his evidence in chief, defendant filed a written application, asking an order of the court against plaintiff to have plaintiff submit himself to a personal examination by competent and special surgeons, appointed by the court, giving as reasons therefor that the real extent of plaintiff's injuries could only be ascertained by such an examination. The court declined to make the order for the reason, as stated, that the application was not made in time. There is no doubt of the power of the court to make and enforce such an order; but to do so is held to be a matter within the discretion of the court, which¹⁰ should not be interfered with unless clearly abused: *Owens*

v. *Kansas City etc. Ry. Co.*, 95 Mo. 177; 6 Am. St. Rep. 39, and cases cited.

There may be reasons which do not appear on this record why an examination should not have been ordered at the time it was applied for, and we are unwilling to say that the court abused its discretion in declining to make the order. This is certainly a case which calls for the opinion of disinterested and unbiased physicians after a careful, intelligent, and thorough examination has been made. The physicians who testified are friends of the respective parties, and their opinions are necessarily more or less biased. They differ upon matters which seem to me to be capable of positive ascertainment. As the case will have to be retried the court can have an examination made, if proper and timely application is made therefor.

4. A carrier of passengers owes to those approaching or leaving its trains the duty of keeping its station platforms in reasonably safe condition for convenient use, and is liable to such persons, who are themselves duly careful, for damages sustained by reason of its negligence in not observing this duty. This duty and the liability of the carrier for its neglect are well settled: *Hutchinson on Carriers*, sec. 517; 1 *Rorer on Railroads*, 476.

It also follows from this obligation imposed by law that a passenger, in leaving a train, has the right to assume, in the absence of information to the contrary, that he can safely pass across the depot platform to take a conveyance to his destination, and there was no error in the instruction which told the jury that plaintiff had the right to assume that the platform was reasonably safe and convenient for his use.

5. It being the duty of the receivers of this corporation to use reasonable care to see that their platform was kept in a safe and convenient condition for ¹¹ use, it was gross negligence to allow a hole, eight inches wide and six feet long, to remain in the floor of that part of the platform commonly used by passengers, for the period of four days after knowledge thereof by their agents: *Hutchinson on Carriers*, sec. 517; 2 *Shearman and Redfield on Negligence*, sec. 411.

It is true, in general, that the question of negligence in such case is one of fact for the determination of the jury; but the evidence in this case shows that the defect was made by one of defendant's agents, in moving heavy freight, at least four days before the injury, and the station agent testified that he

knew of the defect for that length of time. The most ordinary care would have prompted the repairing of the defect, or at least that some warning should be given. Necessary repairs could have been made in a few minutes and at the cost of but a few cents. We must, therefore, hold that the evidence conclusively shows that defendants had ample time after notice of the defect in which to have made necessary repairs, and it was not reversible error to give the third instruction, to the effect that, if there was a hole in the platform, which was known by defendant's agents, or might have been known by the use of ordinary care, and the same was not safely repaired, and no danger signals were put up to warn passengers, then such neglect and failure was negligence on the part of defendants.

The complaint that the instruction did not allow defendants a reasonable time in which to make repairs cannot avail them in a case like this, in which the defect was manifestly dangerous, and its existence was known for so long a time. The court might well have declared, as a matter of law, that this omission of duty was negligence.

6. The judgment in this case is the largest one, for personal injuries, that I have been called upon to ¹² consider, except in *Gurley v. Missouri Pac. Ry. Co.*, 104 Mo. 211, which was held to be excessive. We are asked to set aside this verdict upon two grounds: 1. That the measure of damages given by the court to the jury was improper and unfair; and 2. That the verdict was so excessive as to show prejudice on the part of the jury in arriving at it. We need only consider the first.

The petition does not specify any special injury except that plaintiff suffered rupture from falling through the platform and "other severe, painful, and permanent injuries." The evidence shows that plaintiff's body fell through the hole to his hips, upon which he lodged. This was on Monday, in the month of July. Plaintiff was a traveling commercial agent engaged in his business. He continued in the performance of his duties until he arrived at home, on Saturday thereafter, before calling in a physician. During this time he testified that he suffered from rupture and bruises on his hips. It does not appear that he was confined to his bed or room any considerable time, though he claimed he had difficulty and inconvenience in traveling and transacting his business. In February or March, after his fall, ulcers formed on one of his hips, and for a short time after his injury he

complained of pains and weakness in his back. Plaintiff introduced three doctors, and defendants two, who testified as experts. All these physicians had examined plaintiff previous to the trial, and had applied all the usual tests to ascertain his condition. Those introduced by plaintiff testified that they found rupture; that there were ulcers on the hip, which may have involved the hip bones; and that he was suffering from nervousness caused by injury to the spine; that this injury to the spine would likely be permanent and might result in paralysis and death.

¹³ Their testimony indicated that plaintiff was a physical wreck. On the other hand, the physicians introduced by defendant testified that they could find no symptom of rupture or injury to the spine, and gave it as their opinion that the sores on the hip were only skin deep, and were caused intentionally by applications of some kind.

With this evidence of injury and damage the court gave this instruction: "4. If you find for the plaintiff you will allow him such sum as will compensate him for bodily pain and suffering, mental anguish, and inconvenience, in the parts that have resulted from his injury. You will also take into consideration the present and prospective condition of his rupture, if you believe from the evidence he was ruptured, and of the injuries to his hips and spine, resulting from the accident; and to the same above found, you may add compensation for the future effect of the injuries upon the use of his hips and spine, and upon his health that you believe will be occasioned by the accident, providing you believe that he has not recovered, or that his injuries are permanent."

It will be seen from the instruction that the jury was left to determine, from the evidence, whether or not plaintiff was ruptured; but the court assumed that he was injured in the hip and spine. This was more than a comment upon the evidence. It was taking entirely from the jury a vital issue upon which the evidence was conflicting and irreconcilable. The court may in its instructions to the jury assume the truth of a proposition which is established by the undisputed testimony, but it is manifestly improper to do so where there is any conflict in the evidence: *Hall v. Missouri Pac. Ry. Co.*, 74 Mo. 302; *Barr v. Armstrong*, 56 Mo. 589; *Caldwell v. Stephens*, 57 Mo. 595. The fact that the jury was ¹⁴ expressly required to find that the plaintiff was ruptured renders the assumption that he suffered injuries to the spine

more conspicuous. It is manifest that there could have been no such damages awarded for such injuries to the hip and abdomen as were shown by plaintiff's evidence. A very large part of the damages, then, must have been given on account of possible results from assumed injuries to the spine.

One of the plaintiff's physicians placed before the jury his gloomy prospects in the following graphic language: "State if any other result follows from the spinal trouble you have described? A. Yes, sir; of course it depends altogether upon the extent and location of the nervous lesions; he may be paralyzed; he may have paralysis of his whole body; he may have loss of speech, and loss of hearing, and loss of eyesight, and loss of sexual powers, and loss of digestion—all those functions depend upon the nerves sometimes."

It may be that all these results will follow an injury to the spine, and the jury could so conclude from this evidence; and it becomes, therefore, more important that they should first conclude, from the evidence, that plaintiff suffered such an injury. The instruction was improper and prejudicial, and should reverse the judgment.

Reversed and remanded.

All concur except BARCLAY, J., who is absent.

RECEIVERS.—DEGREE OF CARE REQUIRED OF: See note to *McNulta v. Lockridge*, 31 Am. St. Rep. 374.

RECEIVERS.—LIABILITY OF FOR INJURIES ARISING FROM NEGLIGENCE OF THEIR EMPLOYEES: See extended note to *Naglee v. Alexandria etc. Ry. Co.*, 5 Am. St. Rep. 315; *McNulta v. Lockridge*, 137 Ill. 270; 31 Am. St. Rep. 362, and note.

RECEIVERS.—WHETHER LEAVE TO SUE IS NECESSARY: See monographic note on liability of railroad corporations while road is in hands of trustees or receivers: *Naglee v. Alexandria etc. Ry. Co.*, 5 Am. St. Rep. 316.

PERSONAL PHYSICAL EXAMINATION OF PARTY TO SUIT.—POWER OF COURT TO ORDER, in an action for personal injuries: See *Graves v. City of Battle Creek*, 95 Mich. 266; 35 Am. St. Rep. 561; and full discussion of the subject in the monographic note to *Sidekum v. Wabash etc. Ry. Co.*, 3 Am. St. Rep. 554-557.

CARRIERS.—RAILROAD COMPANIES ARE LIABLE FOR FAILING TO KEEP STATIONS, STATION PLATFORMS, ETC., IN REPAIR: See *Johns v. Charlotte etc. R. R. Co.*, 39 S. C. 162; 39 Am. St. Rep. 709, and note; note to *Little Rock etc. Ry. Co. v. Lawton*, 29 Am. St. Rep. 55; *Missouri Pac. Ry. Co. v. Long*, 81 Tex. 253; 26 Am. St. Rep. 811, and note.

THE QUESTION OF NEGLIGENCE IN FALLING INTO HOLES OR THROUGH DEFECTIVE PLATFORMS around railway stations, whereby injury is occasioned, is generally one of fact for the jury: *Cross v. Lake Shore etc. Ry. Co.*, 49 Mich. 363; 13 Am. St. Rep. 399; *Pennsylvania Co. v. Marion*, 123 Ind.

415; 18 Am. St. Rep. 330; *Missouri Pac. Ry. Co. v. Long*, 81 Tex. 253; 26 Am. St. Rep. 811, and note, showing when there is a want of contributory negligence in such cases.

RAILROAD COMPANY IS GUILTY OF NEGLIGENCE, WHEN, in allowing a platform to remain out of repair: See *Pennsylvania Co. v. Marion*, 123 Ind. 415; 18 Am. St. Rep. 330.

INSTRUCTIONS.—The charge to a jury may assume the truth of facts not disputed, but must not assume as true disputed facts: See monographic note to *Sharp v. State*, 14 Am. St. Rep. 37, 44.

TRABUE v. DWELLING HOUSE INSURANCE CO.

[121 MISSOURI, 75.]

INSURANCE—CHANGE OF TITLE BY PARTITION.—A change in the title of property resulting from its partition among its co-owners avoids a policy of insurance thereon containing a condition that it shall become void if any change other than by death, takes place in the interest, title, or possession of the subject of the insurance, whether by legal possession or judgment, or by voluntary act of the assured or otherwise.

INSURANCE—DIVISIBILITY OF.—A breach of condition as to part of the property which is subject to a policy of insurance by a change in the title thereto does not avoid the whole policy, though it contains a condition that the entire policy shall become void if any change takes place in the interest, title, or possession of the subject of the insurance.

Joshua F. Hicklin and Ed E. Yates, for the appellant.

Reuben F. Roy and George A. Mahan, for the respondents.

¶ **GANTT**, P. J. The facts alleged in the petition and supported by the evidence, and which are not controverted by the parties in this suit, are as follows: The defendant company, by the policy of insurance on which this suit is based, insured Anthony E. Trabue against loss by fire or lightning for a term of five years, beginning at noon on the twentieth day of April, 1888, in the sum of eight hundred dollars, on the dwelling-house occupied at the time by said Trabue, and the sum of two hundred and fifty dollars on the contents of said dwelling-house, and also two hundred dollars on other property which escaped the fire. The insured was the owner of the insured property.

On the first day of February, 1889, said insured died at his place of residence, which was said dwelling-house, in Ralls county, Missouri. At the time of his death there was living with him at the said dwelling-house, his wife, the plaintiff, Christiana Trabue, and three of his children, plaintiffs herein,

to wit: Taylor J. Trabue, Kitty R. Trabue, and Mary G. Trabue. The insured left a will, by which he devised to his wife, Christiana Trabue, one-third of his estate during her widowhood, and the residue and remainder he devised to his four children, his only descendants, plaintiffs herein, in equal parts, with the provision that the portion willed to one child, Taylor J. Trabue, should go to him and his bodily heirs. The plaintiff, Christiana Trabue, was appointed executrix and was qualified as such. The plaintiff, Mary G. Trabue, is a ⁴⁰ minor and was a member of her father's family at the time of his death. The property was destroyed by fire October 16, 1890. At the time of the loss the plaintiff, Christiana Trabue, was occupying the house as a dwelling-house. Three of her children, the plaintiffs Taylor J. Trabue, Kitty R. Trabue, and Mary G. Trabue, were living with her as a part of her family.

Prior to said loss the plaintiffs, in an *ex parte* proceeding, in the Ralls circuit court, had the real estate devised to them by said Trabue partitioned among them, and that portion on which said dwelling-house stood, including said house, was set off to said Christiana Trabue during her natural life or widowhood. Notice and proof of loss were given, and the property was worth the amount claimed. The personal property insured was in said house in the possession of Christiana Trabue at the time of the loss.

In March, 1864, just before their marriage, said Anthony E. Trabue and Christiana Trabue entered into a marriage contract, by which it was agreed that neither should have or inherit any interest in the property of the other, and it was provided that the said Christiana Trabue should not receive any dower or inherit any property of said Anthony E. Trabue, except as he should give or devise to her.

The policy contained this clause: "This entire policy shall be void if any change (other than by death of the insured) take place in the interest, title, or possession of the subject of insurance, whether by legal possession or judgment, or by voluntary act of the insured or otherwise."

The circuit court gave judgment for plaintiffs for the whole amount of the policy, and defendant appealed to the St. Louis court of appeals, where the judgment was reversed without remanding, but the decision being in conflict with the decision of the Kansas City court ⁸¹ of appeals in *Crook v. Phoenix Ins. Co.*, 38 Mo. App. 582, the cause was certified

to this court under the mandate of section 6 of the constitutional amendment of 1884.

1. The St. Louis court of appeals held the policy was avoided as to the dwelling-house by the transfer of the title thereto by the partition proceedings, and judgment therein, between the devisees of Anthony E. Trabue, the loss having occurred after that decree. The court waived all discussion of the effect of the marriage contract, and whether the will alone which became operative upon his death worked a change of property "other than by death of the insured," and placed their judgment upon the view that the partition proceedings had that effect.

In that conclusion we concur. A partition of property, whether by deeds *inter sese*, or by the judgment or decree of court, effects "the change of interest, title, or possession," against which the policy provided: *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447; 29 Am. Rep. 180; *Burbank v. Rockingham etc. Ins. Co.*, 24 N. H. 550; 57 Am. Dec. 300; *Hine v. Woolworth*, 93 N. Y. 75; 45 Am. Rep. 176; *Barnes v. Union etc. Ins. Co.*, 51 Me. 110; 81 Am. Dec. 562; *Finley v. Lycoming etc. Ins. Co.*, 30 Pa. St. 311; 72 Am. Dec. 705; *Dreher v. Aetna Ins. Co.*, 18 Mo. 128.

2. As this judgment on its face only affected the real estate covered by said policy the plaintiffs insist they are entitled to recover the insurance on the personal property, as to which there was no breach of any condition in the policy; but the defendant insists that by the use of the terms "entire policy" in said clause, the whole policy is avoided for a breach in any respect. If defendant's contention be correct it is a most appropriate subject for legislative correction at the earliest opportunity. But is this clause properly construed by the court of appeals?

⁸² As early as the case of *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, it was held by this court that where a firm obtained insurance upon a storehouse and a stock of goods therein, in separate amounts, and the insurance on the house was avoided because the interest in the house was incorrectly described in the application, the policy was not vitiated as to the goods. In other words, this court then held that such a contract was divisible. Afterwards, in *Koontz v. Hannibal Sav. and Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 325, the action was on a policy by defendant on a livery-stable, the livestock and personal property, each separately stated and appraised.

In that case Judge Wagner reviewed the cases, and admitted there was a conflict between the decisions, but held that *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, was a binding authority, and "cheerfully followed it because this court regarded it as in consonance with justice." These two cases have never been overruled or their authority questioned until the decision of *American Ins. Co. v. Barnett*, in 73 Mo. 364, 39 Am. Rep. 517.

The very able and learned judge of the St. Louis court of appeals, who prepared the opinion in *Holloway v. Dwelling-House Ins. Co.*, 48 Mo. App. 1, considered the *American Ins. Co. v. Barnett*, 73 Mo. 364, 39 Am. Rep. 517, as the controlling decision, and followed it, as required by the constitution of this court; and in this case, Thompson, judge, treated the point as decided by the *Holloway* case, and as clear of all difficulty. Since then the Kansas City court of appeals in *Shoup v. Dwelling-House etc. Ins. Co.*, 51 Mo. App. 286, has followed Judge Rombauer's decision in the *Holloway* case, so that it becomes very important to determine the effect of *American Ins. Co. v. Barnett*, 37 Mo. 364; 39 Am. Rep. 517.

An examination of that case will show that the remarks of the learned judge who delivered that opinion were entirely "*obiter dictum*," as to this question of the divisibility of the contract. He says "If such a ⁸³ stipulation was in fact in the policy," the plaintiff would be entitled to the full relief prayed. So that it is clear no such clause was before the court, and while his opinion is entitled to respect on the supposed case, it is equally clear that the court did not overrule the decision in *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, or *Koontz v. Hannibal etc. Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 325; but, on the contrary, on the only point that was in fact before the court, those cases were treated as binding authority. Our conclusion is that so much of Judge Norton's opinion as referred to the entirety of the policy in *American Ins. Co. v. Barnett*, 37 Mo. 364, 39 Am. Rep. 517, was *obiter*, and did not overrule *Koontz v. Hannibal etc. Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 325, and *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247.

But, independent of the binding authority of those cases, we think they were correctly decided. In both of those cases, "the policy" was to be void, upon certain conditions. Here it is said "the entire policy" shall be avoided. "The policy" includes all and every part of it, and the insertion of

the word "entire" cannot add any thing more to it, so that this mere verbal addition has not, in our opinion, changed the law of the case.

The cases cited by Judge Norton from Pennsylvania, Maine, Maryland, and other states are based upon the case of *Friesmuth v. Agawam etc. Ins. Co.*, 10 Cush. 587. By the laws of Massachusetts the policy in that case was a lien on the interest of the assured in both the building and personal property insured. In holding that such a policy was an indivisible contract, Judge Bigelow put it upon the ground that the consideration was regarded as an entirety for which the deposit note was given, and the liability of the assured to assessments on that amount in case of losses. He said: "They (the company) had the right to look to their lien on each and all of the different kinds of property insured by them for the security of the whole amount of the deposit note"; and so that policy said on its face. Upon the facts of ⁸⁴ that case no question can be made on its correctness. The lien was given on all the property. A false representation affected all of the lien. On the same principle stand the subsequent cases of *Brown v. People's Mut. Ins. Co.*, 11 Cush. 281; *Gould v. York County etc. Ins. Co.*, 47 Me. 403; 74 Am. Dec. 494. In *Gottzman v. Pennsylvania Ins. Co.*, 56 Pa. St. 210, 94 Am. Dec. 55, Judge Thompson cites the Friesmuth case, and those based on that case without, however, adverting to the statutory lien.

That other courts have adopted this construction of the entirety of the contract is not questioned, but, entertaining for them as we do all due respect, we see no reason for departing from our own decisions when they are based upon what appears to us the soundest reason. When one applies for distinct and separate insurance, a part on real estate, a part on personal property, he can require two separate policies. The accidental circumstance that for convenience merely they are included in one policy does not merge them into one. If the goods alone were destroyed, the terms of the policy applying to them alone could be made the basis of recovery. The supposed danger of making a contract for the parties is not in the case. The question is whether, according to legal principles, the contract made is severable or entire. There is nothing to indicate the company would not have assumed the risk on the house without taking one also on the goods, nor *vice versa*. The contract as to each admitted of being separately executed as to the separate subjects of

insurance. The application is for separate insurance, and and it is kept distinct in the policy.

Nor are the cases of *Koontz v. Hannibal etc. Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 325, and *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, unsupported by authorities in other states. In *Phœnix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521, the supreme court of Kentucky held that when insurance was obtained upon a storehouse and stock of goods in an action for loss on the goods, the fact that the insurance on the house ⁸⁵ was void because the interest on the insured was incorrectly stated did not vitiate the policy on the goods, but it would be treated as a separate policy, citing *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, with approval. In *Clark v. New England etc. Ins. Co.*, 6 Cush. 342, 53 Am. Dec. 44, a policy made separate insurance on two buildings with a clause declaring it void if the insured should alienate the property; it was held that alienation of one building did not avoid it as to the other. In *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184, the policy was upon several separate and distinct classes and species of property, each, as in the case at bar, separately valued; the sum total of the valuation was insured for a premium in gross; the contract was held severable. Judge Folger reviewed all the cases, including the two cases of *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, and *Koontz v. Hannibal etc. Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 325, decided by this court, and in a most satisfactory manner sustained the reasoning of those cases, upon the analogies of the law, and the proper construction of contract: *Johnson v. Johnson*, 3 Bos. & P. 162; *Mayfield v. Wadsley*, 3 Barn. & C. 357; *Goring v. Insurance Co.*, 10 Ont. 236; *Hartford etc. Ins. Co. v. Walsh*, 54 Ill. 164; 5 Am. Rep. 115; *Date v. Insurance Co.*, 14 U. C. C. P. 548; *Deiderick v. Commercial Ins. Co.*, 10 Johns. 234; *Trench v. Chenango etc. Ins. Co.*, 7 Hill, 122; *Phillips v. Insurance Co.*, 46 U. C. Q. B. 334; *Heacock v. Saratoga etc. Ins. Co.*, referred to in *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; 29 Am. Rep. 184; *Moore v. Virginia etc. Ins. Co.*, 28 Gratt. 508; 26 Am. Rep. 873.

The Merrill case came under review in 1886 in *Schuster v. Dutchess County Ins. Co.*, 102 N. Y. 260, and was unanimously sustained. In 1891, in *Pratt v. Dwelling-House etc. Ins. Co.*, 130 N. Y. 206, the question again recurring, the court of appeals says: "Whatever the rule may be elsewhere, it is

settled in this state that where insurance is made on different kinds of property, each separately valued, the contract is severable, even if but one premium is paid, and the amount insured is the sum total of the valuations": See, also, *Smith v. Home Ins. Co.*, 14 N. Y. St. ⁸⁸ Rep. 106; *Woodward v. Republic Fire Ins. Co.*, 32 Hun, 365; *German Ins. Co. v. Fairbank*, 32 Neb. 750; 29 Am. St. Rep. 459.

In the very recent case of *Coleman v. Insurance Co.*, 49 Ohio St. 310, 34 Am. St. Rep. 565, the supreme court of Ohio aligns itself in this conflict of authority on the side taken by this court in *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, and *Koontz v. Hannibal etc. Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 325, holding such contracts as this severable: *Vide*, also, *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 582; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 530; 27 Am. Rep. 582; *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696.

When this contract was made, then, it was the settled rule of decision in this state that such a contract as this was divisible or severable, although the policy had a clause which would avoid the whole contract. The addition of the word "entire," given its utmost latitude, could not avoid any more than the whole policy, hence it added nothing to the policy. Forfeitures are not favored in the law, and will not be enforced if any reasonable interpretation can be made which will prevent one. No reason is given here why a forfeiture should be enforced, except the insertion of the word "entire" into the policy. The risk was not increased. The premiums were taken, kept, and enjoyed for insurance on the personal property. The policy as to the house was avoided, doubtless, through the ignorance of the insured, but they have violated no condition as to this personal property. Holding, then, as we do, that this was a divisible contract, it results that the legal effect is the same as if two distinct and separate policies were issued, and so reading the contract, we do not reject the word "entire" at all, but apply it to that policy or portion of this policy which the insured has forfeited by the change of title, to which alone this clause refers, and it avoids that "entire" policy, and not the policy in which no condition ⁸⁷ or warranty has been broken. This construction logically follows from the divisibility of the contract, and best accords with fair dealing, and the presumed intention of the parties.

Our conclusion is that neither the law nor common honesty

will permit the defendant to avoid paying the loss as to this personal property. The judgment of the St. Louis court of appeals is affirmed in so far as it adjudged the policy on the dwelling-house avoided, and reversed in so far as it avoids the insurance on the personal property, and the cause is remanded to that court with directions to affirm the judgment of the circuit court to the amount of two hundred and fifty dollars, the amount of insurance on personal property and piano, and reverse it as to the remainder of said judgment. The costs of the appeal to this court are adjudged to plaintiffs, and the costs of the appeal to the St. Louis court of appeals are adjudged to defendant, as also the costs in the circuit court, after the offer of judgment was made, the other costs to plaintiff.

All of this division concur.

INSURANCE—CHANGE OF TITLE BY PARTITION.—A policy of insurance on an undivided half of certain buildings, providing that it shall be void "when the title of any property insured shall be changed by sale, mortgage, or otherwise," becomes void upon a partition of the premises rendered upon a judgment on the petition of a cotenant of the insured: *Barnes v. Union etc. Ins. Co.*, 51 Me. 110; 81 Am. Dec. 562. A policy of insurance is not avoided by sales of the property made by one part owner to another: *Hoffman v. Aetna etc. Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337, and note. See, also, the note to *Allemania etc. Ins. Co. v. Peck*, 23 Am. St. Rep. 618.

INSURANCE—CONTRACT WHEN ENTIRE.—A policy of insurance covering several lots of personal property in the same building, and distributing the risk to each item, but providing for the payment of a gross sum as premium, creates an indivisible contract. If such policy is conditioned to be no longer binding upon the insurer in case the property is levied upon or taken into possession under any legal process, a levy upon part of the property renders the policy void as to the whole: *Burr v. German Ins. Co.*, 84 Wis. 76; 36 Am. St. Rep. 905, and note, with the cases collected. See further on this question the extended note to *Gould v. York County etc. Ins. Co.*, 74 Am. Dec. 498.

CAMPBELL v. MISSOURI PACIFIC RAILWAY CO.

[121 MISSOURI, 840.]

CONSTITUTIONAL LAW.—A STATUTE MAKING EVERY PERSON AND CORPORATION RESPONSIBLE IN DAMAGES for property injured or damaged by fire communicated directly or indirectly by locomotive engines in use upon railroads, without proof of negligence, is constitutional.

PLEADING—VARIANCE.—A person whose property was destroyed by fire communicated from a locomotive, and who alleged negligence on the part of the owner of the locomotive, may recover without proof of such negligence, if the statute of the state makes the owner answerable whether negligent or not. The statement of facts by plaintiff which

were not required to perfect his cause of action did not forfeit his right to recover upon the facts which he was required to state.

EVIDENCE OF FIRES OTHER THAN THE ONE CHARGED.—In an action to recover compensation for injuries alleged to have been suffered by the escape of fire from a locomotive, and its communication to the property of the plaintiff, when the question is whether the fire causing the damage in fact originated from one of the defendant's engines, it is proper to receive evidence tending to prove that other fires, both before and after the one in question, had been started at different points along the line of defendant's road by sparks from some of its engines. Such evidence is admissible, because it tends to prove the possibility, and the consequent probability, that the fire was communicated to plaintiff's property from one of defendant's locomotives.

RAILWAYS, DAMAGES TO NON-INSURABLE PROPERTY BY FIRE FROM LOCOMOTIVES.—If a statute makes railway corporations answerable for all damages caused by fire communicated from their engines to the property of others, and gives such corporations an insurable interest in the property for whose destruction it may be answerable, it cannot escape liability for any claim of property on the ground that it was of such a character that the corporation could not have effected insurance thereon.

H. S. Priest and William S. Shirk, for the appellant.

Edwards & Davison and Draffen & Williams, for the respondent.

244 MACFARLANE, J. This is an action to recover damages, as alleged, by the burning of plaintiff's building, fences, shrubbery, etc., by fire communicated from one of defendant's locomotives. The petition charged negligence on the part of defendant in permitting fire to escape. The answer was a general denial.

It is agreed by counsel that the evidence, though circumstantial, tended to prove that the fire, which consumed plaintiff's property, was communicated from one of defendant's engines while being operated on its road. The court permitted a recovery under section 2615 of the statute without proof of negligence on the part of the defendant.

1. The first proposition insisted upon as ground for reversal of the judgment is that said section 2615, ²⁴⁵ which makes every person and corporation responsible in damages for property injured or damaged by fire communicated directly or indirectly by locomotive engines, in use upon their railroads, without proof of negligence, is unconstitutional. This objection has received the careful consideration of this court in Bank at this term in the case of *Mathews v. St. Louis etc. Ry. Co.*, 121 Mo. 298, in which the statute in

question was held valid. The objection under the authority of that case must, therefore, be overruled.

It may not be out of place here to take the occasion of stating that, in my opinion, the statute can be sustained on the broad ground that it is merely remedial in its character, and is authorized under the general powers of the legislature to provide appropriate remedies for the redress of such wrongs as are contemplated. "The remedy does not alter the contract or the tort; it takes away no vested right; for the defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective, remedy": Endlich on Interpretation of Statutes, sec. 285.

It is unquestioned that the utmost diligence and care cannot prevent the escape of fire from locomotive engines. We have, then, this condition of things. The corporation is given the right, by the statute, to run its engines by steam power, necessitating the use of fire. Fire necessarily escapes, and is scattered along the route. The citizen owns property on the line of the road, which is exposed to fire from those engines, regardless of the care and vigilance he may exercise. Both parties are faultless, but nevertheless the property of the owner is consumed by fire from an engine. The property owner has the right to own the property, and to claim protection under the law, equal at least to the right of the corporation to use fire on its engines. The ²⁴⁶ loss must necessarily fall upon one or the other of these parties. Which one of them shall suffer the loss, the one through whose agency the damage was caused, though in the lawful use of its own property, or the one equally innocent of wrong, and who had no agency in causing the damage? Tested by the rule of natural right and equity, there could be but one answer to the inquiry. This answer is formulated into the maxim that "every one should so use his own property as not to injure that of his neighbor."

Prior to the statute under consideration the loss was made to fall upon the owner, who was innocent of fault in the use and care of his own property, and had no part in setting at liberty the destructive agency. The rule was manifestly unjust. To change this rule, and place the liability where it should rest, is the purpose of the statute. In the language of Dewey, J., in *Lyman v. Boston etc. R. R. Corp.*, 4 Cush. 290, we consider the statute "as one of those general remedial acts passed for the more effectual protection of property,

against the hazards to which it has become subject by the introduction of locomotive engines. The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may reasonably justify." The statute considered in that case imposed on the railroad company absolute liability for damages caused by fires escaping from engines.

So, in a recent case in Connecticut, the court, in discussing a similar statute, says: "In this view of the case the statute rests upon broad grounds of justice and equity. It is designed to do justice where before there was a partial failure of justice. It is, therefore, a remedial statute in the best sense, and we must so construe ³⁴⁷ it as to suppress the mischief and advance the remedy": *Martin v. New York etc. R. R. Co.*, 62 Conn. 340.

The contract between the state and the corporation is that the latter may propel its trains by the use of steam generated by fire. There was no agreement that it should be exempt from liability for the consequences resulting to others from its use of fire. In respect to such consequences it is subject to control by remedial laws to the same extent as natural persons. Fire, when uncontrolled, is necessarily destructive of property. As shown in the opinion of Gantt, J., in *Mathews v. St. Louis etc. Ry. Co.*, 121 Mo. 298, damage caused by fire was recoverable at common law without proof of negligence. There is no reason why the common law could not, or indeed should not, be restored, in cases in which the lawful use of property by one necessarily exposes the property of others to damage by fire.

A statute of this state declared that "if any person shall willfully set on fire any woods, marshes, or prairies, so as thereby to occasion any damage to any other person, such person shall make satisfaction for such damage to the party injured, to be recovered in an action on the case": Rev. Stats. 1845, sec. 3, p. 1091. This act came before this court in 1848, and its validity was not questioned, though that distinguished jurist, Leonard, afterward judge of this court, represented the party charged with the damage, and a recovery without proof of negligence was affirmed. In that case the court held that the fact that the fire was set on defendant's land constituted no defense under the statute: *Finley v.*

Further on in the same opinion the judge says: "The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire along their passage." To the same effect are the following cases: *Smith v. Boston etc. R. R. Co.*, 63 N. H. 25; *Chicago etc. Ry. Co. v. Gilbert*, 52 Fed. Rep. 711; *Thatcher v. Maine Cent. R. R. Co.*, 85 Me. 509.

We think the evidence tended to prove the possibility, and consequent probability, that the fire was communicated to plaintiff's property from one of defendant's engines, and that the evidence was admissible and its probative force was for the determination of the jury. If the issue had been of negligence in the construction or management of the engine only, and the engine which could only have caused the damage, had been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible under the decisions of this court: *Coale v. Hannibal etc. R. R. Co.*, 60 Mo. 227; *Patton v. St. Louis etc. Ry. Co.*, 87 Mo. 117; 56 Am. Rep. 446. But, in case the fact whether the fire originated from the engine was alone in issue, and there was no direct proof of the fact, it seems very clear that such evidence would have some tendency to prove that issue. The evidence was all circumstantial, and the facts testified to were circumstances, though slight they may have been, bearing upon the issue.

4. Defendant insists, further, that plaintiff was not entitled to recover under the statute for personal property burned, nor for shrubs, trees, and flowers upon which defendant could not obtain insurance. For support of this contention counsel cite *Chapman v. Atlantic etc. R. R. Co.*, 37 Me. 92. The loss considered in that case was a lot of cedar posts temporarily deposited near the road. The statute made the railroad responsible when a building or other property is injured by the fire communicated by a locomotive engine; and gave to the corporation "an insurable interest in the property along the route, for which it is responsible." After discussing the statute the court says: "The conclusion to which we have arrived is, that the liability of railroad corporations, under

this statute, extends only to property permanently existing along their route, and capable of being insured, and that as to movable property, having no permanent location, the liability of such corporations is to be determined by the principles of the common law. In *Pratt v. Atlantic etc. R. R. Co.*, 42 Me. 579, the same court held that the liability of the company under this statute was not confined to real estate, but extended to personal property as well.

Exemption from responsibility under the statute of that state has never extended beyond injury to movable property temporarily placed near the track. In the ³⁵³ recent case of *Thatcher v. Maine Cent. R. R. Co.*, 85 Me. 509, the supreme court of that state very evidently disapproves the decision in *Chapman v. Atlantic etc. R. R. Co.*, 37 Me. 92, though it expressly states that it had no intention of overruling it.

The court agreed that a different construction of the statute had been given by the courts of Massachusetts, Vermont, and New Hampshire, from the one declared in the *Chapman* case.

We do not think so narrow a construction should be given our statute. It is remedial, and such construction should be given it as will advance the remedy. Indeed, the language of the statute is too plain and unambiguous to admit of but one construction. The corporation shall be responsible "to every person or corporation whose property may be injured or destroyed." This language leaves no room for discussion as to the character of the property contemplated; it includes all property that may be injured or destroyed.

We do not think it necessary to the validity of the statute that the railroad corporations should have been given an insurable interest in the property upon the route of their roads; nor does the fact that such interest was given limit their responsibility to insurable property that may be injured or destroyed. The purpose of the law was to give the corporation the same right and opportunity of protection, and indemnity from fires, as the owner of the property had. What property is the subject of insurance must be determined by the insurance companies, whether the indemnity is sought by the owner or by the corporation.

Judgment affirmed.

SHERWOOD, J., dissented; BARCLAY, J., absent. The other judges concurred.

RAILROADS.—CONSTITUTIONALITY OF STATUTE IMPOSING LIABILITY FOR FIRE: See *Union Pac. Ry. Co. v. De Busk*, 12 Col. 294; 13 Am. St. Rep. 221, and note; *Oregon Ry. etc. Co. v. Smalley*, 1 Wash. 206; 22 Am. St. Rep. 143, and note.

RAILROADS—FIRE.—NEGLIGENCE OF COMPANY NEED NOT BE SPECIFICALLY ALLEGED in an action to recover for damage occasioned by fire from a locomotive: See note to *Union Pac. Ry. Co. v. De Busk*, 13 Am. St. Rep. 233. Ordinarily, where fires are shown to have originated from sparks thrown out by a railroad engine, negligence on the part of the railroad company is presumed, and it must overcome this presumption: See note to *Meyer v. Vicksburg etc. R. R. Co.*, 17 Am. St. Rep. 411; note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490; *Louisville etc. R. R. Co. v. Reese*, 7 Am. St. Rep. 66; *Gulf etc. Ry. Co. v. Benson*, 69 Tex. 407; 5 Am. St. Rep. 74. But upon this proposition the authorities are conflicting: See *Henderson v. Philadelphia etc. Ry. Co.*, 144 Pa. St. 461; 27 Am. St. Rep. 652; *Meyer v. Vicksburg etc. R. R. Co.*, 41 La. Ann. 639; 17 Am. St. Rep. 408; monographic note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 71. The plaintiff must, at least, assume the burden of proving that there was a fire, and that it was communicated by a locomotive: *Inman v. Elberton Air Line R. R. Co.*, 90 Ga. 663; 35 Am. St. Rep. 232.

RAILROADS.—EVIDENCE OF OTHER FIRES IS ADMISSIBLE in an action against a railroad company to recover for loss by fire communicated by its locomotive: *Inman v. Elberton Air Line R. R. Co.*, 90 Ga. 663; 35 Am. St. Rep. 232; *Henderson v. Philadelphia etc. Ry. Co.*, 144 Pa. St. 461; 27 Am. St. Rep. 652.

RAILROADS—FIRES—INSURABLE INTEREST.—The provision of a statute, imposing upon a railroad company a liability for fire caused by its locomotive, and which gives the company an insurable interest in the property liable to be injured, does not limit the liability of the company for injury to property such as is ordinarily regarded as insurable: *Grissell v. Housatonic R. R. Co.*, 54 Conn. 447; 1 Am. St. Rep. 138.

In the previous case of *Mathews v. St. Louis etc. Ry. Co.*, 121 Mo. 228, the court considered more fully than in the principal case the question whether a statute imposing liability for damages done by fire communicated from a railway locomotive, irrespective of the question of negligence, was constitutional or not, and, in sustaining the validity of such statute, said:

“Finally, is it unconstitutional because it deprives defendant of its property ‘without due process of law,’ or in defiance of ‘the law of the land’? We accept Mr. Webster’s definition of the law of the land: ‘By law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man’s estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. Judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country.’

"We cheerfully concede that if this act comes within this definition it is our sworn duty to declare it void and inoperative, notwithstanding the high respect we have and owe to the legislative and executive branches of our government, which enacted and approved this act. Let us subject this statute to the test. At common law, if a person used a highly dangerous machine, he must do so at the peril of the consequences if it caused injury to others: *Fletcher v. Rylands*, L. R. 1 Ex. 265; L. R. 3 H. L. 330, and the authorities referred to in Comyn's Digest, title Action on the Case for Negligence, 'A,' 6. But, when the legislature expressly authorized railroads in this state to operate and propel their cars by locomotive engines, it was ruled by our courts that the roads were only liable for negligence in setting out fire upon the premises of adjoining owners, in the absence of specific legislation to the contrary. And here lies the real contention of defendant in this case. It is that it is not competent for the legislature or law-making power to attach an absolute liability.

"We have seen that at common law the liability for fire was absolute. In *Jones v. Festiniog Ry. Co.*, L. R. 3 Q. B. 733, Blackburn, J., said: 'The general rule of common law is correctly given in *Fletcher v. Rylands*, L. R. 1 Ex. 265, 279, affirmed in the house of lords, L. R. 3 H. L. 330, that when a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his peril, and is liable for the consequences if it escapes and does injury to his neighbor. Here the defendants were using a locomotive engine with no express parliamentary powers making lawful that use, and they are therefore at common law bound to keep the engines from doing injury, and, if the sparks escape and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part.'

"It took acts of parliament (6 Anne, c. 31, and 14 Geo. III., c. 78) in England to repeal this absolute liability for fire, accidentally set out on one's own premises, and extending upon his adjoining proprietor. But, if parliament might repeal, it might also re-enact.

"By the general statutes of Connecticut, section 6, page 489, one who kindles a fire on his own land is made liable for all damages it may do if it runs upon the land of another, and proof of negligence is not required. A similar statute was passed in Iowa, and sustained in *Conn v. May*, 36 Iowa, 241.

"When the legislature passed the general railroad act, giving them the right to use steam, had it also annexed as a condition that the railroad should be absolutely liable for all damages they might cause by fire set out by them, would any one have questioned its power to do so? Had it been done, then would it not have been a valid exercise of its police power? No violation of the obligation of the contract could be charged in that case, and, if it be a valid exercise of police power, all the authorities and defendant's counsel agree that the state is not restricted from asserting it by reason of the prior grant of the charter, for all charters are subject to it.

"Does it, then, contravene natural rights? Is it open to the indictment preferred by defendant that it arbitrarily takes its property and confers it upon another without a hearing or consideration? We have seen that it was the ancient common law that the owner was liable for fire escaping from his own premises, whether negligent or not, and that different states in the union have re-enacted the old common law, by which the owner is now absolutely liable for damage by fire put out on his own premises. Looking for the reason underlying the ancient rule of law, we find that it had its

origin in the dangerous character of fire, and that whoever put this dangerous agency in motion was rightfully required to see that it did no harm. That while it was an elementary principle that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property, the mode of enjoyment was necessarily limited by the rights of others; otherwise it might result in the destruction of their rights altogether. Hence the maxim, '*Sic utere tuo non laedas alienum.*' So that while it has been generally held that one is only liable for negligence in the prosecution of a lawful business, nothing is more firmly settled than that a man cannot erect a nuisance or employ dangerous agencies to the annoyance of an adjoining proprietor, even for the purposes of a lawful trade. And it was an old common-law maxim that, where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who occasioned the injury, rather than upon the one who had no agency in producing the damage.

"Counsel for defendant, in his earnest denunciation of the act as violative of every principle of justice and indefensible as a police regulation, says: 'But we are not aware that this principle of "*Sic utere, etc.*," has ever been extended so far as to make a man liable for the lawful and careful use of his own property.'

"In *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279, the court of appeals of New York had this case before it: The defendant was a corporation chartered by the legislature and authorized to construct a canal. In the construction of the canal they resorted to blasting, and threw stone, gravel, and slate upon the house and premises of plaintiff. He brought his action without alleging negligence. The defendants moved for a nonsuit, insisting that it was necessary both to aver and prove negligence and wantonness, and plaintiff had failed to do either. The trial court nonsuited plaintiff. The court of appeals reversed the case, saying: 'The defendants had the right to dig the canal; the plaintiff the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted.'

"In *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284, the defendants offered to prove 'that the work was done in the best and most careful manner.' The common pleas court rejected it as irrelevant, as the declaration neither averred willfulness nor negligence. The court of appeals sustained the common pleas court, and held it was not necessary to charge or prove negligence to recover.

"In *McAndrews v. Collerd*, 42 N. J. L. 189, 36 Am. Rep. 508, these two cases in New York were reviewed and approved. In the New Jersey case the Delaware, Lackawana & Western Railroad Company was authorized by its charter to construct a tunnel through Bergen Hill. It contracted with McAndrews to do the work. The tunnel was driven through rock, was begun in 1873, and finished in 1877. McAndrews constructed near the eastern end of the tunnel, and within the limits of Jersey City, a magazine for explosive materials, which he used for blasting. In 1876, at night, the materials exploded, doing damage to property, and among others injured Collerd's houses. In a suit by Collerd for damages, it was held: '1. That the legislative authority to a private corporation, or an individual, to do a

work for its or his own profit, does not include authority to use, at whatever hazard to the persons or property of others, dangerous materials, even though they are necessary to the convenient prosecution of the work; 2. They will be liable for the injury, although no negligence or want of skill in executing the work is proved, and liable for actual damages, even though they show that they have done the work in the most careful manner.'

"In *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654, the action was sustained 'upon the ground that the manufacturing and storing of fireworks, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance, for which the defendant was liable to respond in damages, without regard to the question whether he was chargeable with carelessness or negligence. The defendant had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder, which, without any apparent cause, exploded and caused the injury.' The court says: 'The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application.'

"It is significant that the argument employed by the court in that case to show the dangerous character of the magazine, and for that reason to take it out of the rule that exonerates one in a lawful business from liability save for negligence, is identically the same used by defendant in this case to escape liability. It admits that it uses fire in its engines, and that the utmost care cannot, and does not, prevent its destroying the property of adjoining proprietors, and yet insists, because it is engaged in a lawful business, it can only be made liable for negligence: See, also, *Bohan v. Port Jervis Gas Light Co.*, 122 N. Y. 18; *Laflin etc. Powder Co. v. Tearney*, 131 Ill. 322; 19 Am. St. Rep. 34. We think it is clear that upon the plainest principles of justice it ought to be liable, and that when experience demonstrated the dangerous character of the locomotive engine in setting out fire, it was not only the right, but the manifest duty, of the legislature to hold the railroads liable for fires set out by them without reference to whether they were guilty of negligence or not.

"Nor do we think there is any force in the argument that by so doing their property is arbitrarily taken without right. The right to compel them to respond is based upon their use of a dangerous element, and by their destruction of adjoining proprietors' property. Moreover, it is not done in an arbitrary manner. The plaintiff is required to show to a jury or court organized as in any other case that the road did set out the fire; that it did destroy his property; and the jury must, from the evidence, determine the amount of the damage. In no sense is it a finding without a hearing, nor are the essentials to a recovery based upon unreasonable or untenable grounds; in a word, he is simply called upon to respond to a legal duty established by proofs. The wrong done by the dangerous agency set in motion by the company and under its control is ample consideration for the compensation it is required by the statute to make the owner whose property it destroys.

"But were it without compensation it would not follow that the statute would be void. Many instances to the contrary were enumerated in *Boston etc. R. R. Co. v. County Commrs.*, 79 Me. 386, 2 Ry. & Corp. L. J. 210, in which it was held that the legislature might lawfully require railroads to

since their tracks, although the act was subsequent to the charter, and although it imposed a burden and expense on the company not existing when it was incorporated. Emery, judge, says the wide extent of the police power 'can be illustrated by instances of its actual exercise without direct compensation.' Many of these instances are too familiar to need citation of authorities. He enumerates those cases in which licenses to manufacture liquor have been recalled, and the manufacturer prohibited after much expenditure by the licensees: *Beer Co. v. Massachusetts*, 97 U. S. 23. Lotteries chartered for a consideration paid have been suppressed: *Stone v. Mississippi*, 101 U. S. 814. The various inspection laws by which dealers are required to pay the inspection fees. Dealers using weights and measures must have them approved, and pay the approving officer. The blameless sufferer from a contagious disease is often compelled to leave home and friends, and bear his pain in some quarantine hospital; and his clothing destroyed, all at his own expense. The right of municipalities to destroy buildings to prevent spread of fire in an emergency. The owners of theaters, hotels, and other public buildings are required at their own expense to provide fire-escapes and more ample means of exit. Steamboats are subject to inspection, and must pay the fees therefor. Railroads are constantly having imposed upon them additional duties with reference to safety of persons and property—new inventions in brakes, switches, blocking their switches, etc: *Pierce on Railroads*, 462, 463."

STATE v. MOORE.

[121 MISSOURI, 514.]

CRIMINAL LAW.—A STATUTE IMPOSING A GREATER PUNISHMENT FOR A SECOND OFFENSE, because of prior conviction for another offense, is not unconstitutional. It does not punish twice for the first crime.

INDICTMENT—DUPLICITY.—An indictment charging an accused with the commission of a crime, and also his conviction of another and entirely different offense, is not bad for duplicity, if the statute imposes an increased punishment on offenders who have before been convicted of crime.

Charles T. Noland, for the appellant.

R. F. Walker, attorney general, and *C. O. Bishop*, for the state.

517 **BURGESS, J.** Defendant was indicted in the St. Louis criminal court for burglary in the first degree, and larceny in a dwelling-house. The indictment charged that defendant "on the eleventh day of January, A. D. 1887, at the city of St. Louis, in the St. Louis criminal court, was duly convicted, on his own confession, of the offense of grand larceny, and, in accordance with said confession, was duly sentenced by said court to imprisonment in the penitentiary for the term of three

years, and was duly imprisoned in said penitentiary in accordance with said sentence; and that the said Frank Moore, after his discharge from said penitentiary upon compliance with said sentence, to wit, on the twenty-fifth day of May, A. D. 1893, etc., did commit the said offenses of burglary and larceny." Defendant was arraigned at the July term, 1893, and pleaded not guilty.

At the November term following, defendant withdrew his plea of not guilty, and filed his motion to ⁵¹⁸ quash the indictment, which, being overruled, he was again arraigned, pleaded not guilty, was put upon his trial, which resulted in his conviction of burglary in the second degree, his punishment being fixed at imprisonment in the penitentiary for life. From the judgment and sentence he appeals.

The evidence showed that defendant had been convicted, on his plea of guilty in open court, of grand larceny, for which he had been sentenced to, and had served a term in, the Missouri penitentiary; that afterwards, on the night of the twenty-sixth day of May, 1893, he had entered into the dwelling-house of one S. M. Tucker, in the city of St. Louis, through the outer door, which does not appear to have been closed, then into the room occupied by one Mr. Stephens and another, by raising the latch or turning the knob on and opening the door which led therein and which was closed; that he took and stole from Stephens about thirty-four dollars in money and a watch worth forty-five dollars. The watch was found upon defendant's person when he was arrested; the money he admitted to have thrown away. He was discovered when making his exit from Stephens' room by a Mr. Love, who was occupying the room with Stephens. Stephens followed him out into the hallway, and, while attempting to restrain him, was shot in the face by defendant with a pistol which defendant had in his hand. Stephens and Love got him down, however, and held him until a policeman came and took him into custody. On the trial he admitted the larceny, but denied the burglary. No brief has been filed in his behalf.

In the motion to quash the indictment the contention is that it is bad: 1. Because in violation of both the state and federal constitutions; 2. That it is bad because of duplicity. It is difficult to conjecture wherein or in what manner the statute (Rev. Stats. ⁵¹⁹ 1889, sec. 3959), imposing a greater punishment for a second criminal offense, is in violation of

the constitution, either as putting a person twice in jeopardy, or as prescribing different punishments for different persons committing the same offense. The clauses of the constitution of the United States, which we suppose it was contended were violated, are those which provide: 1. That "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"; and 2. "Nor cruel and unusual punishment inflicted."

In a case similar to the one in hand, and under a similar statute, it was held (*People v. Stanley*, 47 Cal. 118; 17 Am. Rep. 401) that because the punishment for the second offense is increased, because of a prior conviction for another offense, the accused is not punished twice for the same offense. That he is not again punished for the first offense, "but the punishment for the second is increased, because by his persistence in the perpetration of crime he has evinced a depravity which merits a greater punishment and needs to be restrained by severer penalties than if it were his first offense."

In Virginia, under a similar statute, also, in *Rand v. Commonwealth*, 9 Gratt. 743, the court says: "No constitutional or other obstacle, however, seems to stand in the way of the legislature's passing an act declaring that persons thereafter convicted of certain offenses committed after the passage of the act, may, if shown to have committed like offenses before, be subjected to greater punishment than that prescribed for those whose previous course in life does not indicate so great a degree of moral depravity. One convicted under such a statute cannot justly complain that his former transgressions have been brought up in a judgment against him. He knew, or is presumed to have known, before the commission of the second offense, all the penalties ⁵²⁰ denounced against it; and if in some sense the additional punishment may be said to be a consequence of the first offense (inasmuch as there could be no sentence for such punishment in the absence of proof of the first conviction), still it is not a necessary consequence; but one which could only arise on the conviction for the second offense, and one, therefore, which, being fully apprised of in advance, the offender was left free to brave or avoid."

In Massachusetts a similar statute has been enacted, and in *Ross's case*, 2 Pick. 170, the court says: "The statute . . . provides that if any person having been before convicted of larceny shall afterward commit another larceny, he shall

be punished more severely than if he had not previously committed the like offense. The punishment is enhanced from the character of the culprit. So the same statute provides that, if a person shall be convicted at the same term of three distinct offenses, he shall receive a more severe punishment. The same objection would apply in these cases as much in the one under consideration, that the culprit was punished because he had committed prior offenses, and that he was punished anew for those offenses. But, in our view, the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself." The same views are expressed in *Plumbly v. Commonwealth*, 2 Met. 413; *Ingalls v. State*, 48 Wis. 647; *Maguire v. State*, 47 Md. 485.

The increased severity of the punishment for the subsequent offense is not a punishment for the same offense for the second time, but a severer punishment for the subsequent offense, the law which imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the ⁵²¹ further commission of crime; and we are unable to see how the statute which imposes such increased punishment violates the provisions of our constitution heretofore quoted. We are not inclined to think the punishment imposed for the second offense of so grave a character, either cruel or unusual.

Nor are we inclined to hold the indictment bad for duplicity. Section 3529 of the Revised Statutes especially provides that the offenses of larceny and burglary may properly be charged in the same count. The fact that the indictment charged a former conviction of another and entirely different offense is not in fact charging him with an offense with respect of the former offense in the case in hand. The averments as to the former offense go as to the punishment only. In *Regina v. Clark*, 6 Cox C. C. 210, it is held that several previous convictions may be lawfully set out in the indictment when the object in setting them out is only to justify a severer punishment. We must, therefore, hold that the objections to the indictment are not well taken: See, also, *State v. Austin*, 113 Mo. 538.

There does not seem to have been any incompetent or irrelevant testimony introduced by the state, as averred by defendant in his motion for a new trial. Nor is there any thing in the record which shows that the defendant, "in the

presence of the jury, charged the court with being prejudiced against him." But even if there was, the judge was not disqualified from proceeding with the trial of the cause by reason of such statements. The only way by which a judge may be disqualified from sitting in the trial of a cause is by reason of the existence of some one or more of the causes mentioned by section 4174 of the Revised Statutes 1889, and by a compliance with its provisions.

The sixth ground assigned by defendant why a new trial should be granted him is that the court ⁵²² forced him to trial without his having an attorney to assist and defend him against the charges in the indictment. This assignment is not sustained by the record, which shows that the court offered and insisted upon assigning counsel for defendant, but that he refused to permit it to be done or to accept the services of an attorney thus assigned. While section 4140 of the Revised Statutes of 1889 requires the court to appoint counsel for any person about to be arraigned upon an indictment for a felony, at his request, when he is without counsel to conduct his defense, and is unable to employ any, it is no part of his duty to force the services or presence of counsel on any person under indictment for crime who does not desire them, and who, as the defendant did in this case, refuses to accept them.

Defendant also claims that he was forced to trial without the presence of his witnesses. His affidavit, as copied into the record, avers that he desired witnesses to prove that the front door to the dwelling-house through which he entered was always left open at night. There was no pretense or claim on the part of the state that this door was closed at the time of the burglary, and the court instructed the jury that there was no evidence of the breaking of the outer door, and it is not probable that the defendant could have been prejudiced by the absence of witnesses by whom he expected to prove facts that were wholly immaterial, and that there was no claim upon the part of the state did not exist.

The instructions covered every phase of the case, and were quite fair to the defendant. After a careful examination of them we have been unable to see any objection to them, nor has any objection other than that which is general been suggested in the motion for a new trial.

⁵²³ There is no merit in the objection made to the remarks of the prosecuting attorney, as they were warranted by the

facts in the case as disclosed by the evidence, which showed defendant's guilt beyond any reasonable doubt. There does not seem to be any error in the record which would justify a reversal of the judgment, and it should be affirmed.

It is so ordered.

All of this division concur.

STATUTES IMPOSING GREATER PUNISHMENT FOR SECOND OFFENSE.—A statute providing that a person shall be subjected to an increased punishment upon conviction for a second offense is not in violation of a constitutional provision that no person shall be put twice in jeopardy for the same offense: *People v. Stanley*, 47 Cal. 113; 17 Am. Rep. 401. An increased penalty imposed by statute for a second conviction of the offense described therein is not regarded as an increased penalty imposed for the same offense, but as a new and distinct penalty provided for another and separate offense: *State v. Wilbor*, 1 R. L. 199; 36 Am. Dec. 245.

INDICTMENT.—**CHARGING TWO OR MORE OFFENSES IN THE SAME INDICTMENT:** See the extended note to *Ben v. State*, 58 Am. Dec. 238.

WALKER v. HANNIBAL & ST. JOSEPH RAILROAD COMPANY.

[121 MISSOURI, 575.]

MASTER AND SERVANT.—A MASTER IS NOT ANSWERABLE for the negligent act of his servant or agent if the latter in performing the act from which the injury resulted was not acting in the course of his employment.

RAILWAY CORPORATION IS NOT ANSWERABLE FOR THE NEGLIGENCE of one of its employees in throwing certain articles from a baggage-car while the train was in motion, and thus inflicting injury on a person standing near the track, if in so doing the employee was not acting in the course of his employment, but was performing a duty voluntarily assumed for a person other than his employer, and from the performance of which the master derived no benefit.

RAILWAY CORPORATIONS.—**AUTHORITY OF AN EMPLOYEE TO DO AN ACT WITHIN THE LINE OF HIS EMPLOYMENT IS NOT TO BE INFERRED** unless express authority is proved, or the officers of the corporation are shown to have known the employee to be engaged in the acts in question for such a length of time as would justify the presumption that he was authorized to do them. Mere knowledge on the part of another employee who had no authority over the employee whose act is in question is not sufficient.

RAILWAY CORPORATIONS.—**THE ACT OF A STATION AGENT** in shipping articles over the line gratuitously, and not as freight, is not within the scope of his authority, and cannot subject the corporation to liability for the negligent act of another of its employees respecting such articles also outside of the line of his employment, and not for or on account of the corporation.

Spencer & Mosman and Fagg & Ball, for the appellant.

Harrison & Mahan, for the respondent.

579 BURGESS, J. Action to recover damages on account of personal injuries sustained by plaintiff by 580 reason of the alleged negligence of the servant of defendant.

The evidence showed that the plaintiff was the general foreman in charge of the works of the Hannibal Lime Company, at Bear creek, a small station on the line of defendant's road, six miles west of Hannibal; that the office of the lime company was in that city; that plaintiff had charge of all its business, including the shipment of lime from Bear creek, and had been such foreman for five or more years previous to the injury; that he was accustomed to send iron drills, used for getting out the rock to make lime, to a blacksmith at Withers Mill, two miles west of Bear creek, to be sharpened. The drills were from five to six feet in length, weighing some thirteen pounds each. They were sometimes sent on wagons, sometimes on handcars, and sometimes in defendant's baggage-car. No instructions or directions were given as to the manner in which the drills were to be returned by the blacksmith. The blacksmith at Withers Mill, Jacob Stover, was postmaster at that place, and was also defendant's ticket agent, and had been for about fifteen years before the accident. After the drills were sharpened by Stover he would take them from the shop to the station-house and lay them down on the railroad platform in front of the depot; they were usually wired three together. He would then tag the drills "Hannibal Lime Company, Bear Creek station," or, if not so tagged, he would mark them with chalk, in the same way. He would then, upon the arrival of defendant's passenger train from the west, put the drills in the baggage-car, in charge of defendant's baggage-man, who would receive them, place them in the car, and deliver them to the lime company at Bear Creek station. If the train stopped he would drop them off at the platform, and, if it did not stop, he would throw 581 the drills off anywhere east of the rock chute. This way of delivering the drills the baggage-man had continued for ten or fifteen years before and up to the day of the injury. It was a custom of long standing, and the drills were so delivered as frequently as from three to five times per week, and often every day in the week during this long

series of years. Each retiring baggage-man would hand down the habit and custom to his successor.

The evidence showed that the plaintiff was in the habit of communicating with the managing officers of his company at Hannibal by letters which he would throw into the baggage-car as the train went by, and on the day of this accident he went down to the track in order to put a letter which he had written his employers in Hannibal on the train, as he had been accustomed to do; that, as the train came in, he was standing with one foot on the rail of the sidetrack nearest the main line, with the letter in his hand; when the train got within two hundred feet of him, he noticed the ends of the drills projecting out of the open door of the baggage-car, saw them raised up, and saw the baggage-man look out of the door and down the track towards the point where he was standing, and then withdraw himself inside the car. Anticipating that the drills were to be thrown off, plaintiff at once left his position by the side of the track and ran northward to get out of the way, and he had gotten about fifteen feet from the point where he was standing when he was hit with the drills.

The baggage-man testified that he looked out of the door of the car, and down along the track, and, seeing plaintiff standing by the side of the track, stepped back into the car, and bracing himself swung the drills with all his might from the train as far as he could throw them, for the purpose of avoiding any possibility ⁵⁸² of striking plaintiff; that he did not see plaintiff move from the position where he had first seen him, and did not know that he had left that position; that knowing the position where plaintiff stood, he supposed it would be perfectly safe to throw the drills over beyond the sidetrack; the drills struck the ground and, revolving, struck plaintiff, knocking him down, injuring his arm, the point of one of the drills entering his arm. A portion of one of the bones of the forearm had to be removed, thereby shortening that bone and altering the normal position of the hand with relation to the wrist, and, as compared with its previous condition, permanently impairing the usefulness of the hand and arm.

The evidence further showed that James, the man who threw the drills out of the car, was the agent of the American Express Company, and also a train baggage-man in defendant's service; that under the regulation of the defendant,

promulgated for the guidance and direction of train baggage-men, such baggage-men were not permitted to carry any article or commodity in the car which did not belong to the passengers on the train, and come properly within the designation of passenger's baggage, unless it was the property of the railroad company itself, such as tools, material, or supplies sent out by it for its servants at the various stations; that drills shipped by the public over the road properly fell within the designation of freight or express matter, and the train baggage-man, James, was not authorized to carry them; that they could only be carried on a passenger train by the express company as express matter. Plaintiff swore that defendant never to his knowledge received a cent for the carriage of the drills; that so far as he knew his company was the only party interested in their carriage, and this was corroborated by defendant's train baggage-man, Mr. James, who testified ⁵⁸² that he was never instructed by defendant to carry the drills, and never informed any of its officers that he was carrying them; that plaintiff put the drills on the car at Bear creek, and instructed him to throw them off at Withers Mill for "Uncle Jake," and he carried the drills purely as a matter of accommodation, never having received any thing for so doing.

The present management of defendant company took charge in 1884, some two years before the accident. The superintendent, S. E. Crance, the train-master, T. S. Beeler, as well as the general agent of defendant at Hannibal, E. F. Bradford, testified that they did not know the drills were being carried by the baggage-man on a passenger train. Plaintiff's evidence, however, showed that Woodward, the superintendent who preceded Crance, prior to 1884, as well as Beeler, the train-master under the present management, had been seen in the baggage-car on two or three occasions when drills were being carried by the baggage-man, but the evidence further showed that the presence of drills in the car, if seen by them, would excite no suspicion that they were being carried by the baggage-man for outside parties; that it was perfectly right and proper to carry drills and tools belonging to the defendant in the car, or to carry such drills in the baggage-car as express matter. The evidence further showed that Hance, the conductor of the train, was frequently in the car when the drills were being carried, and probably knew that the baggage-man was carrying the lime com-

pany's drills, but it was shown that the train baggage-man, in his department of work, and in respect to his special duties, was entirely independent of the conductor, who had no authority over him in respect to the nature of the articles carried in the car. Defendant demurred to the case made by plaintiff's evidence, and renewed its demurrer at the close of all ⁵⁸⁴ the evidence, but it was overruled. A trial resulted in a judgment for the plaintiff in the sum of five thousand dollars, and the defendant, after an unsuccessful motion for a new trial, brings the case to this court by an appeal.

Before the defendant can be held liable for the negligent act of its baggage-man it must be made to appear not only that at the time of the injury he was its servant and in its employ, but that the act of the servant which occasioned the injury was done in the course of his employment. The master is not liable for the acts of the servant which are not connected with the service which the servant had been employed to perform. If, for instance, a servant should be employed to do a particular thing or kind of work, and does something else, without his master's consent, and, by reason of his negligence or carelessness, another is injured, the master is not liable, because the injury was not done in the course of his employment. In order that the master may be held liable the act causing the injury must pertain to the duties which the servant was employed to perform. If the baggage-man, in delivering the drills, was not serving his master, but was merely doing so to accommodate others, and the master was deriving no benefit therefrom, then the master is not liable, even though the injury complained of would not have been committed without the facilities afforded by the baggage-man's relations to the defendant: *Garretzen v. Du-enckel*, 50 Mo. 104; 11 Am. Rep. 405; *Cousins v. Hannibal etc. R. R. Co.*, 66 Mo. 572; *Mitchell v. Crassweller*, 13 Com. B. 236; *Farber v. Missouri Pac. Ry. Co.*, 116 Mo. 81.

In *Towanda Coal Co. v. Heeman*, 86 Pa. St. 418, plaintiff, a small boy, climbed onto the cars, and a brakeman, after the train started, threw coal at him, striking him in the face, blinding him, and he slipped off, and was run over. The evidence showed that the brakeman ⁵⁸⁵ had no duty to perform in admitting or excluding persons from the train; that this duty was vested solely in the conductor. The court denied a recovery, saying: "The legal rule was stated in the opinion of Alderson, J., in that case (*McKenzie v. McLeod*, 10 Bing.

385) to be that the act of the servant is the act of the master where the duty is defined by precise orders, and where something is directed to be done, and the manner of doing it is left wholly to the discretion of the servant, the judgment exercised may be considered the judgment of the master, and he must be answerable. 'But,' the judge added, 'where he neither ordered the thing to be done, nor allowed the servant any discretion as to the mode of doing it, I cannot see how in common justice or common sense the master can be held responsible.'" An examination of all the testimony showed that there was nothing contained in it to prove that the brakeman, whose conduct was complained of in the assault he made on the plaintiff, was acting in pursuance of any authority conferred on him.

In *Farber v. Missouri Pac. Ry. Co.*, 32 Mo. App. 378, the court says: "The mere fact that a tortious act is committed by a servant while he is actually engaged in the performance of the service, cannot make the master liable. Something more is required. It must not only be done while employed, but it must pertain to the duties of the employment. This has been repeatedly decided in this state: *McKeon v. Citizen's Ry. Co.*, 42 Mo. 83; *Snyder v. Hannibal etc. R. R. Co.*, 60 Mo. 419; *Jackson v. St. Louis etc. Ry. Co.*, 87 Mo. 430; 56 Am Rep. 460."

In *Walton v. New York Cent. Sleeping Car Co.*, 139 Mass. 556, the defendant was the owner of sleeping-cars running in the trains of the Boston and Albany Railway over its road, and had in its employ as a porter on the car one Maxwell. Maxwell had arranged with a woman at ~~500~~ Newton to do his washing, and the woman was to send her daughter to the train to get his soiled linen. Maxwell did the linen up in a bundle, and, as the train ran through the station without stopping, dropped the bundle off, and it struck plaintiff, a track-man on the Boston and Albany road, and injured him severely, and he brought suit against the sleeping-car company. Plaintiff asked the trial court to rule "that, if Maxwell was in the employ of the defendant, paid by it for taking care of the car, allowed to keep articles of personal property of his own in the car, and, having such articles in his possession in the car, on this occasion carelessly and negligently threw the same from the car while passing over the railroad therein, in the performance of his general duties in the care of the car, and hit the plaintiff, then being in the

exercise of due care and rightfully on the railway, the defendant would be liable for all such damages resulting therefrom as would be legally recoverable for the injury occasioned thereby."

"The judge refused so to rule, and ruled as follows: 'The defendant is not responsible, if the injury to plaintiff was done by Maxwell, the servant of the defendant, without the authority of the defendant, and not for the purpose of executing the defendant's orders, or doing the defendant's work, and not while acting as such servant in the scope of his employment. If Maxwell was employed by the defendant as a porter upon its parlor-car, and, wholly for a purpose of his own, and, disregarding the object for which he was employed, and not intending by his act to execute it, negligently threw a bundle, his own property, from the platform of the parlor-car, and thereby the plaintiff, who was not a passenger, was hit and injured while in the exercise of due care, and if this injury was done by Maxwell not within the scope of his employment, then ⁵⁸⁷ the defendant is not liable. . . . ' The judge also ruled, as requested by the defendant, that, upon all the evidence, the plaintiff could not recover." The supreme court says: "The rulings and instructions of the court were correct. There was no evidence that Maxwell was employed by the defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment; and it is wholly immaterial that he was, at the moment, riding in a car of the defendant, in which he was employed by it for other purposes."

In *Cunningham v. Railroad*, 31 U. C. Q. B. 350, the plaintiff was in the employment of one C., a contractor with defendant for building fences along its line. As a matter of convenience to him, he was permitted by defendant to carry his tools upon its trains, and was, at the time of the injury, taking two crowbars from Port Hope to a point on the line of the road where his men were at work. As the train passed the spot, C. dropped one bar out, and the baggage-master pitched out the other, which struck and injured the plaintiff. The baggage-man had nothing to do with C. nor any right to meddle with his tools; nor did he ask him to put the bar out. *Held*, that defendant was not responsible for the injury, for the baggage-man was not acting as the servant for defendant, nor in pursuance of his employment.

The evidence shows that the baggage-man in the case at

bar was a special agent, having no general power, and that his duties were to look alone after the baggage of passengers. Carrying the drills which occasioned the injury was not within the line of his employment. It necessarily follows that the defendant cannot be held responsible for any injuries occasioned by the negligent handling of them, unless it was done by the direction of defendant's officers and ⁵⁸⁸ agents, or with their knowledge and consent and for the benefit of defendant corporation. To establish this knowledge on the part of defendant's officers it was shown that the conductor in charge of the train knew that it was the custom of the baggage-man to carry the drills to and from Withers Mill to Bear creek, and to dump them off at the latter place, on their return, while the train was in motion. Beeler, the general agent, E. F. Bradford, superintendent, and the former superintendent, Woodward, had been in the baggage-car on several occasions when the drills were being carried by the baggage-man. But the evidence also showed that the conductor had no control over the baggage-man, who was also express messenger, and that it was not unusual to carry such things as express matter; the other parties—Crance, Beeler, and Bradford—stated that they did not know that the drills were being carried by the baggage-man for outside parties, even if they saw them.

The plaintiff testified as follows: "I don't know that Mr. Beeler knew any thing about the arrangement by which the bars were carried. . . . I never paid any thing to the company for carrying the drills; I never knew the lime company to pay any thing to the defendant for carrying them. . . . The railroad never received a dollar or a cent, to my knowledge, for the carriage of the drills or the letters that I spoke of."

"Q. No officer of the company knew any thing about those drills being carried there, to your absolute knowledge?
A. No, sir. . . . I knew the lime company was the only one interested. I did not speak to Mr. Woodward about the drills, nor let him know that the blacksmith was sharpening the drills for us, or that the drills were being carried on the train." The evidence did not show that the officers of the defendant ⁵⁸⁹ knew that the baggage-man was in the habit of carrying the drills for the lime company, that they consented to it, or that it came within the line of his duty to do so; but it did show to the contrary.

If it had been shown that the baggage-man had been in the habit of carrying the drills and putting them off at Bear Creek station by and with the knowledge and consent of defendant's officers and its agent, authority to do so might be inferred therefrom: *Edwards v. Thomas*, 66 Mo. 468. But he was, also, at the same time agent for an express company, and his conduct in handling the drills was as consistent with the one service as the other. Moreover, he testified that he was not acting as baggage-man in handling the drills; that he did so gratuitously, merely as an accommodation to the plaintiff, and the evidence of the plaintiff himself tended strongly to show that such was the case. The mere fact that the baggage-man handled the drills was no evidence of itself that he was doing so in the capacity of baggage-man, and was no notice to defendant. In order to make defendant liable for the act of the baggage-man for acts of negligence committed not in the line of his employment, it must be shown that he either had express authority to transact the business connected with the injury, or that defendant, by its officers, knew that he, as its agent, was so engaged for such a length of time as would justify the presumption that he was authorized to so act. It was not enough that the conductor, Hance, had knowledge that the baggage-man was in the habit of carrying the drills from Withers Mill and putting them off at Bear Creek station for the lime company, for, as has been said, the conductor had no control whatever over him, and notice to him was not notice to the defendant company.

But it is contended by plaintiff that Jacob Stover, ⁵⁹⁰ the defendant's ticket agent at Withers Mill, shipped the drills on the passenger train of defendant of his own accord, without solicitation of plaintiff, and with the acquiescence, if not permission, of defendant, and that in so doing he was in the line of his employment as station agent, his act was that of the defendant, and that it is estopped to deny that its agent acted without its knowledge and authority. That this position is correct with respect of the acts of a station agent clothed with the power to receive and forward freight, and who acts within the scope of his authority, seems to be well settled law: *Harrison v. Missouri Pac. Ry. Co.*, 74 Mo. 370; 41 Am. Rep. 318, and authorities cited. But there was not one scintilla of evidence which showed, or tended to show, that the drills were sent as freight, or that Stover had any

authority to send them as such, or in any other way, on defendant's passenger trains.

Stover's acts in sending the drills by the baggage-man, as well also as of the latter in handling them, were unauthorized by defendant, who should not be held responsible for the injury under the circumstances disclosed by the evidence. The arrangement seems to have been one between plaintiff for the lime company and James, the train baggage-man, with reference to something not in the line of his employment, and of which his employer had no knowledge, and gave no consent.

Under the views herein expressed it becomes unnecessary to pass upon the question as to what duty defendant owed plaintiff at the time of the injury when on its right of way for the purpose of mailing letters upon its train.

The demurrer to the evidence should have been sustained. The judgment is reversed.

All of this division concur.

MASTER AND SERVANT—MASTER'S LIABILITY TO THIRD PERSONS.—DEVIATION BY SERVANT: See *Ritchie v. Waller*, 63 Conn. 155; 38 Am. St. Rep. 361, and note.

MASTER AND SERVANT.—THE QUESTION OF SCOPE OF EMPLOYMENT is, in most cases, one of fact: *Ritchie v. Waller*, 63 Conn. 155; 38 Am. St. Rep. 361.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

ENEWOLD v. OLSEN.

[30 NEBRASKA, 59.]

PARTIES—NAMES—PLEADING.—A person's legal name is made up of his given name and his surname, and to be ignorant of either is to be ignorant of such person's name within the meaning of a statute authorizing suit against a party by another than his true name, if the plaintiff is ignorant of the defendant's correct name.

PROCESS—NAMES—JURISDICTION.—A defendant must be sued by his true name if it is known or can be ascertained by the plaintiff. Hence, except in those special cases in which the statute allows the full Christian name to be dispensed with, a court obtains no jurisdiction over the person of a defendant served with summons by leaving a copy thereof at his usual place of residence, in compliance with the statute, unless such defendant is designated by his true name.

JUDGMENT—PROCESS—JURISDICTION.—A personal judgment, after default, based upon the service of a summons, in which the law required the defendant to be designated by his true name, but which did not state his full name, and which was served by leaving a copy thereof at the defendant's usual place of residence, is a nullity, and cannot, if it has become dormant, be revived, as the court acquired no jurisdiction over the defendant.

JUDGMENT—MISTAKE IN NAME.—A judgment against "F. Olsen, full name unknown," is void as a judgment against "Ferdinand Olsen," if the summons in the case was not personally served on him.

DORMANT JUDGMENT, REVIVAL OF—DEFENSE.—In proceedings to revive a dormant judgment the defense may be interposed that the judgment is void, because the court pronouncing it had no jurisdiction over the person of the defendant, if such lack of jurisdiction affirmatively appears from the record of such judgment.

James A. Powers and Switzler & McIntosh, for the appellant.

C. P. Halligan, for the appellee.

¶1 RAGAN, C. On the twenty-third day of December, 1886, Lawrence C. Enewold brought suit on an account in the county court of Douglas county against one Olsen. In the petition filed Olsen was described as "F. Olsen, full name unknown." The sheriff's return of the summons in the case was as follows: "On December 23, 1886, I received this writ, and on December 23, 1886, I served by leaving a certified copy of this writ and indorsements thereon at the usual place of residence of the within-named F. Olsen, the defendant, in Douglas county, Nebraska." The further proceedings of the county court in the case were as follows: "January 4, 1887, on the call of the docket this day, it appearing to the court that the defendant, F. Olsen, has been served with a summons, and has failed to appear, plead, answer, or demur thereto, and is in default: Now therefore, on motion of plaintiff's attorney, it is ordered that default of the defendant be, and the same is, hereby entered against him. The same day the case came on for trial to the court, L. C. Enewold, the plaintiff, was duly sworn and examined in his own behalf. After hearing the evidence the court finds that said defendant, F. Olsen, real full name unknown, is indebted to the plaintiff in the sum of four hundred and thirty-three dollars and eighty-nine cents. It is therefore considered, adjudged," etc. February 11, 1892, Lawrence C. Enewold filed in said county court a petition against Ferdinand Olsen, praying for a revivor of said judgment. On said day the county court made an order that said judgment be revived, unless Ferdinand Olsen should show cause why it should not be. On February 18, 1892, a copy of this order was duly served on Ferdinand Olsen, and he appeared in the county court and objected to a revival of said judgment on the ground that the same was void, as he, Olsen, was named in the summons "F. Olsen, full name unknown": that the court could only acquire jurisdiction over him by the personal ¶2 service of summons, and that the leaving a copy of the summons at his usual place of residence was not such service upon him as invested the court with jurisdiction over his person. The county court sustained the objection and dismissed the application to revive the judgment. Enewold took this order to the district court, where the ruling of the county court was affirmed, and Enewold brings the judgment of the district court here for review.

Section 69 of the Code of Civil Procedure provides: "The service [of summons] shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at any time before the return day." Section 148 of the Code of Civil Procedure provides: "When the plaintiff shall be ignorant of the name of the defendant such defendant may be designated in any pleading or proceeding by any name and description, and, when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words 'real name unknown,' and a copy thereof must be served personally upon the defendant." The law requires that a defendant shall be sued by his correct name, if known to the plaintiff suing him; and section 69 defines what shall be sufficient notice to him when thus sued. But cases may, and do, arise where the correct name of a party about to be sued is unknown to the plaintiff desiring to bring the action. To meet such cases section 148 was enacted, by which the party sued may be designated by any name and description; but to authorize the suing of a party by a name and description, i. e., by any other than his correct name, the statute not only requires that the plaintiff should be ignorant of the correct name of the party, against whom he desires the law's process under a pseudonym, but to make oath that he has not been able to discover the party's true name. These prerequisites ^{as} complied with, the plaintiff may proceed against the party by whatever name and description he chooses, but the summons in such a case must contain the words "real name unknown," and be personally served on the defendant sued, except in cases brought under section 23 of the Code of Civil Procedure. The law presumes that a party will see a summons left at his usual place of residence, and, if in such summons he is notified by his true name that he has been sued, he must appear and make a defense if he has one; and if he fails to appear in obedience to the writ's command he thereby confesses his liability and want of defense to the action, and is concluded by the judgment; but the law does not require Ferdinand Olsen, should he find on his doorstep a summons directed to "F. Olsen," to know that such summons was meant for him. In such a case, to require Ferdinand Olsen to appear in obedience to the command of such

summons, or be concluded by the judgment, the summons must be delivered to him personally. Ferdinand Olsen may suspect such summons was intended for him, may even know it; yet, until a copy of it is personally served on him, he is not notified of a suit against him.

The inquiries here are: What, within the meaning of said section 148, constitutes a person's true name; and if Enewold was ignorant that Olsen's given name was "Ferdinand," was Enewold then ignorant of Olsen's true name, within the meaning of said section 148? In *Schofield v. Jennings*, 68 Ind. 233, it is said: "By the common law, since the time of William the Norman, a full name consists of one Christian or given name, and one surname, or patronymic. The two, using the Christian name first and the surname last, constitute the legal name of the person." It follows, then, that a person's legal name is made up of his first or given name, and his surname, or patronymic, and for one to be ignorant of either is to be ignorant of such person's name within the meaning of said section 148; ⁶⁴ and that in order to invest the county court with jurisdiction over Ferdinand Olsen in the suit brought by Enewold against him under the name of "F. Olsen, full name unknown," the summons in which Ferdinand Olsen was so designated must have been personally served on him. This not having been done, the judgment rendered by the county court, and which it is here sought to revive, was void. That such summons was left at Ferdinand Olsen's usual place of residence, and that he was aware of it, count for nothing. It might as well have been retained by the sheriff, and Olsen notified by mail of its existence. A personal judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction, and is utterly and entirely void: Black on Judgments, sec. 220. A statute which allows one party to take a personal judgment against another on proof that notice of suit was left at the defendant's usual place of residence ought not to be extended to cases where the party is sued by any other than his true name.

In this proceeding, one to revive a dormant judgment, Olsen is called on to show cause why the judgment should not be revived, and he alleges as a reason why this should not be done that such judgment is void, and that this appears from the record itself. Can Olsen be heard to make this objection in this proceeding? We think he can. In

Wright v. Sweet, 10 Neb. 190, it is said: "Upon proceedings to revive a judgment which has become dormant, . . . no objections will be heard which seek to go behind the original judgment." But this case does not decide, nor was it intended to decide, that a person against whom it was sought to revive a judgment might not make the objection that such judgment was void; that is to say, that there was no such judgment, and that such fact appeared on the face of the record. Suppose that Olsen had disregarded the notice served on him to show cause why this judgment should not be revived. The conditional ⁶⁵ order of revivor, then, would have become absolute; and there are authorities which hold that such order of revivor would estop Olsen from claiming that the original judgment was void, the proceeding to revive being in the nature of a suit on the judgment, and the order of revivor itself a judgment that the judgment revived was valid and in full force: *Comparet v. Hanna*, 34 Ind. 74; *Kelly v. Donlin*, 70 Ill. 378; *Van Fleet on Collateral Attack*, sec. 236, and cases there cited. This point is not necessary, however, to the decision of the case under consideration. It is not raised by counsel in their briefs, and we do not determine it. Nor must we be understood as deciding that a judgment is void because the defendant is sued or summoned, or described in the judgment rendered against him, by a fictitious name, or because he is designated by an initial letter of his given name. What we do decide is that the judgment rendered by the county court in the case of *Enewold v. F. Olsen*, "full name unknown," was void as a judgment against Ferdinand Olsen, because the summons in the case was not personally served on him. There is no error in the record, and the judgment is affirmed.

IRVINE, C., having presided at the trial below, took no part in the decision here.

THE LAW RECOGNIZES BUT ONE CHRISTIAN NAME: *Choen v. State*, 52 Ind. 347; 21 Am. Rep. 179, and note. The omission of the initial letter of defendant's middle name in an action against him is of no consequence: *Allison v. Thomas*, 72 Cal. 562; 1 Am. St. Rep. 89. The middle name is, in fact, surplusage: *Choen v. State*, 52 Ind. 347; 21 Am. Rep. 179; it is not a part of either the Christian or surname, and may be omitted: *Hart v. Lindsey*, 17 N. H. 235; 43 Am. Dec. 597.

EFFECT OF SUING DEFENDANT BY WRONG NAME is matter of abatement only, and will not avoid a judgment against him if he has been actually served: *Walsh v. Kirkpatrick*, 30 Cal. 202; 89 Am. Dec. 85, and note; *Ala-*

bama etc. Ry. Co. v. Bolding, 69 Miss. 255; 30 Am. St. Rep. 541, and note; *Foshier v. Narver*, 24 Or. 441; 41 Am. St. Rep. 874. But in *Crafts v. Siba*, 4 Gray, 194, 64 Am. Dec. 62, it is held that a mistake in the surname of a party, or any other part of his name, is fatal to the validity of legal process if no power of amendment exists. An objection that the Christian name of one of the plaintiffs is incorrectly stated in the copy of a citation served on the defendant is properly overruled, if it is correctly stated in the copy of the petition: *Kirk v. Murphy*, 16 Tex. 654; 67 Am. Dec. 640.

SERVICE OF PROCESS UPON ASHER B. BATES will not support a judgment against Ashley B. Bates: *Bates v. State Bank*, 7 Ark. 394; 46 Am. Dec. 293.

CRANE COMPANY v. SPECHT.

[89 NEBRASKA, 123.]

GUARANTY—CONSTRUCTION OF CONTRACT.—A contract of guaranty will be strictly construed, and, if made with one person or corporation, it cannot be extended to another. Hence, if a contract of guaranty, for goods to be sold to a third party, is made with a corporation which afterwards changes its name and supplies goods after such change, there can be no recovery against the guarantor for the goods so supplied.

GUARANTY—EXTRINSIC EVIDENCE.—If a contract of guaranty is plain, clear, and definite extrinsic evidence is not admissible to vary its terms or meaning.

Cavanagh, Thomas & McGilton, for the appellant.

Wharton & Baird, for the appellee.

125 HARRISON, J. In this case, an action in the district court of Douglas county, Nebraska, the plaintiff, the Crane Company, plaintiff in the court below and in this court, sought to recover of defendant, Christian Specht, a certain sum which it claimed due from defendant as guarantor of the account of one A. C. Lichtenberger to the Crane Bros. Manufacturing Company. The petition of plaintiff is as follows:

“The plaintiff in the above-entitled cause, complaining of defendant therein, for a cause of action states that said plaintiff is a corporation duly organized under the laws of the state of Illinois; that on and prior to August 23, 1889, Crane Bros. Manufacturing Company was a corporation organized and doing business under the laws of the state of Illinois, and was engaged in the sale of plumbing and other materials in the city of Omaha, Nebraska. That prior to said August 23, 1889, said Crane Bros. Manufacturing Company had sold and furnished to one A. C. Lichtenberger goods and materials; that for said goods said Lichtenberger was indebted to said

Crane Bros. Manufacturing Company, and at said date said Crane Bros. Manufacturing Company refused to furnish said Lichtenberger additional goods or material, unless the payment of the bill already incurred by him, and the payment of goods ¹²⁶ thereafter delivered, should be guaranteed by some responsible party; that in consideration of Crane Bros. Manufacturing Company's selling additional goods to said Lichtenberger, said defendant, Christian Specht, executed his written guaranty, whereby he agreed to pay the indebtedness already incurred by said Lichtenberger with said Crane Bros. Manufacturing Company, and the payment of all materials which said Lichtenberger should thereafter purchase of them; that thereafter said Crane Bros. Manufacturing Company, relying upon said guaranty, continued to sell and deliver to said Lichtenberger goods and materials—a copy of said guaranty is hereto attached, marked Exhibit 'A,' and made a part of this petition; that afterwards the said plaintiff became incorporated and succeeded to the business and interests of said Crane Bros. Manufacturing Company, and continued to carry on said business and to supply the customers of said Crane Bros. Manufacturing Company; that, relying upon said guaranty made by said Christian Specht to said Crane Bros. Manufacturing Company, said plaintiff sold and furnished said Lichtenberger goods and materials; that said sales made by plaintiff to said Lichtenberger were made with the knowledge and consent of said defendant and at his request, and with the knowledge and intention of said plaintiff and said defendant that said defendant should be liable to the said plaintiff for goods sold to said Lichtenberger under said guaranty to said Crane Bros. Manufacturing Company, and that said goods were furnished by said plaintiff relying upon said guaranty and at the request of said defendant that said goods should be so furnished; that a statement of said goods furnished by said Crane Bros. Manufacturing Company, and said plaintiff to said Lichtenberger in pursuance of said guaranty made by said defendant, is hereto attached, marked Exhibit 'B,' and made a part hereof; that on account of goods so furnished there remains now due said plaintiff the sum of eight ¹²⁷ hundred and eighty-one dollars and ninety-nine cents (\$881.99), which amount said Lichtenberger has failed and neglected to pay. Wherefore, the plaintiff demands judgment against said defendant in the sum of one thousand dollars (\$1,000), and the costs of suit."

The defendant answers the petition as follows:

"1. That he is not advised as to whether or not the plaintiff is a legal corporation, and cannot admit, and therefore denies, the same.

"2. The defendant, further answering, admits that the Crane Bros. Manufacturing Company sold and furnished to the said A. C. Lichtenberger on or about August 23, 1889, some goods and merchandise; and further admits that on the twenty-third day of August, 1889, he executed the guaranty mentioned in the petition, of which Exhibit 'A' is a copy.

"3. This defendant, further answering, says that he is not advised as to whether or not the plaintiff succeeded to the business interests of Crane Bros. Manufacturing Company, and continued to carry on said business and to supply the customers of said Crane Bros. Manufacturing Company, and cannot admit, and therefore denies, the same.

"4. The defendant, further answering, denies that the plaintiff sold and furnished said Lichtenberger goods and materials as alleged in said petition, and denies that said alleged sales were made to said Lichtenberger with the knowledge and consent of the plaintiff and at his request, and denies that the defendant requested the plaintiff to sell any goods whatever to said Lichtenberger, or ever in any manner whatever agreed to become liable for the same, and denies that there is due the plaintiff the sum of eight hundred and eighty-one dollars from said Lichtenberger, or any part thereof.

"And the said defendant, further answering, denies that he is indebted to the plaintiff in any sum whatever.

"Wherefore the defendant, having fully answered said ~~120~~ petition, prays to be hence dismissed with his reasonable costs."

Exhibit "A," the contract of guaranty, attached to the petition and the foundation of this action, is as follows:

EXHIBIT "A."

"OMAHA, NEB., August 23, 1889.

"Messrs. Crane Bros. Manufacturing Company, City,

"GENTLEMEN: I will guaranty the payment of your account against A. C. Lichtenberger, and for all materials he may purchase from this date. The above is to hold good until written notice is given you by me.

Yours truly,

"C. SPECHT."

A jury was waived and trial had to the court. There was a finding and judgment in favor of defendant. Plaintiff filed a motion for new trial, which was argued and overruled, and the case was brought here by the plaintiff for review.

The evidence in the case discloses that on the twenty-third day of August, 1889, the defendant executed and delivered unto the Crane Bros. Manufacturing Company the guaranty in question (Exhibit "A"); that on or about January 20, 1890, the corporation, at an annual meeting of its stockholders then held, changed its name from Crane Bros. Manufacturing Company to Crane Company, no change or alteration whatever being at this time made in the officers, management, business, or location of place of business, and after such change continued to furnish goods and materials to Lichtenberger, for which goods and materials Lichtenberger failed to pay; that defendant Specht was requested to make a new guaranty to the Crane Company, but refused to do so, and never did execute such a guaranty; that the action is brought upon the account running through the whole time during which Lichtenberger purchased goods of the corporation, both under the old and the new name, for a balance due upon the account, which is due for goods ¹²⁹ sold to Lichtenberger after the change in the name of the corporation.

The question raised by the bill of exceptions and strenuously argued by counsel is, Can the Crane Company recover upon the contract of guaranty given by defendant to Crane Bros. Manufacturing Company? The attorneys for plaintiff contended that the Crane Company was organized on the twentieth day of January, 1890, being the Crane Bros. Manufacturing Company under the new name, Crane Company; that it was composed of the same persons, managed by the same officers, engaged in the same business and at the same location; that there was merely a change in the name, and no other or further change in the composition or operations of the company, and hence it was entitled to recover on this as well as other contracts to which the Crane Bros. Manufacturing Company was a party. The defendant's attorneys claim that the Crane Company cannot recover, by virtue of the guaranty given by defendant to the Crane Bros. Manufacturing Company, any sum due it for goods sold or furnished Lichtenberger after the change of its name to "Crane Company." The contention in the case resolves itself to the question, Did the change in the name of the corporation deprive

it of the right to recover, upon the contract of guaranty given to it by defendant in its former name, the price of goods furnished after the change in style to the party whose account was guaranteed to it under the old name? The answer to this question will be most readily obtained, it seems to me, by an examination of the nature of the contract of guaranty and the construction to be given to it.

In 1 Brandt on Suretyship and Guaranty, second edition, section 93, pages 134 and 135, it is said, in discussing such contracts: "A rule never to be lost sight of in determining the liability of a surety or guarantor is, that he is a favorite of the law, and has a right to stand upon the strict terms of his obligation when such terms are ascertained. This is a rule ¹³⁰ universally recognized by the courts, and is applicable to every variety of circumstances." Again it is said: "A surety or guarantor usually derives no benefit from his contract. His object generally is to befriend the principal. . . . The guarantor is only liable because he has agreed to become so. He is bound by his agreement and nothing else. . . . It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal. Being, then, bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand upon the strict terms of his obligation. To charge him beyond its terms or to permit it to be altered without his consent would be, not to enforce the contract made by him, but to make another for him."

In *Miller v. Stewart*, 9 Wheat. 680, Story, J., says: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or even that it may be for his benefit. He has a right to stand upon the very terms of his contract, and, if he does not assent to any variation of it, and a variation is made, it is fatal."

It being well settled that the foregoing are the rules of law by which such contracts as the one in the case at bar are governed and construed, I will pass now to some of the cases in which these rules have been particularly applied to the facts as developed in the cases, selecting such as are similar

to the one under consideration and more or less directly in point.

In the case of *Allison v. Rutlege*, 5 Yerg. 194, the defendant addressed a letter to "Mr. Allison," by which he became surety for the payment of the purchase price of ¹⁸¹ some bacon purchased by one Cooper, and was sued on the instrument by John and Joseph Allison, as guarantor, for one hundred dollars, the price of the bacon. Catron, C. J., in delivering the opinion of the court, says: "Can, under any circumstances, a recovery be had in this action by force of the guaranty? It is addressed in the singular to Mr. Allison. Rutlege undertook for the debt of Cooper, is bound by the writing, and this only. The contract cannot be varied or its meaning explained without violating the statute of frauds. He did not address himself to two Allisons, but to one. The paper, from its face, could not be given in evidence to sustain the joint action, and it could not be proved by parol that two were meant."

In the case of *Smith v. Montgomery*, 8 Tex. 199, the defendant Montgomery wrote and forwarded a letter of credit as follows:

"COLORADO, Dec. 27, 1839.

"*Col. Smith & Pilgrim,*

"GENTLEMEN: Mr. A. W. Tennard wishes to get some dry goods on time. If you will furnish, I will see you paid as far as to the amount of (\$3,000) three thousand dollars,

"And much oblige yours, with respect,

"JAMES S. MONTGOMERY."

This letter was addressed on the back to Smith alone. It appears that Smith and Pilgrim had been partners in business, but a very short time prior to the date of the letter had dissolved the partnership. The letter, being addressed on the back to Smith alone, was delivered to him, and he supplied the goods to Tennard, who failed to pay for them, and Smith instituted the action to recover from Montgomery, as guarantor, the price of the goods to the amount of the guaranty. Mr. Justice Wheeler, in delivering the opinion of the court, says: "Upon consideration we are all of the opinion that we must look to the address upon the face of the letter, and not to the direction upon the back of it, to ascertain the party to whom its ¹⁸² application and promise were intended, by the writer, to have been made; that, bearing upon its face a direction and address full and complete, and free from am-

biguity, we must take that as the certain criterion to determine its application without regard to the discrepancy in the superscription. If the letter did not bear upon its face the proper address, resort might be had to the superscription, or perhaps to other extrinsic evidence, if necessary, to determine its direction and application: *Bell v. Bruen*, 1 How. 169. But when the contract upon its face is complete and perfect, and certain to every intent, as well in respect to the parties as the subject matter, we do not think it admissible to resort to any thing extrinsic to control the express terms and clear import of the face of the instrument. . . . It is a well-settled rule, applicable to this class of cases, that the liability of a guarantor or surety cannot be extended by implication or otherwise beyond the actual terms of his engagement. It does not matter that a proposed alteration would even be for his benefit, for he has a right to stand upon the very terms of his agreement. The case must be brought strictly within the terms of the guaranty, when reasonably interpreted, or the guarantor will not be liable."

In the case of *Evansville Nat. Bank v. Kaufman*, 93 N. Y. 273, 45 Am. Rep. 204, it is said: "It is always competent for a guarantor to limit his liability, either as to time, amount, or parties, by the terms of his contract, and, if any such limitation be disregarded by the party who claims under it, the guarantor is not bound. It follows that no one can accept its propositions or acquire any advantage therefrom, unless he is expressly referred to or necessarily embraced in the description of the persons to whom the offer of guaranty is addressed."

"Guarantor liable only to person to whom he makes the guaranty": *Second Nat. Bank v. Diefendorf*, 90 Ill. 396.

A guarantor's engagement does not make him answerable¹²⁸ for goods furnished by any other person than the one with whom the contract of guaranty is made. He is not answerable beyond the scope of his engagement: *Walsh v. Bailie*, 10 Johns. 180; *Penoyer v. Watson*, 16 Johns. 100.

"Where a letter of credit is addressed to a particular firm no one else can rely on it as a guaranty": *Taylor v. Wetmore*, 10 Ohio, 491.

In *Barns v. Barrow*, 61 N. Y. 39, 19 Am. Rep. 247, it being a case in which, under a written contract of guaranty made with a particular person, a partnership of which that person was a member sought to recover the value of goods furnished

the person for whose debt or default the guarantor stood charged to answer, it is said: "On the face of this contract it is plain that no one could act upon it, except the persons named in it." And Burge on Suretyship, chapter 3, is cited as follows: "The contract of suretyship is to be construed strictly; that is, the obligation is not to be extended to any other subject, to any other person, or to any other period of time than is expressed, or necessarily included, in it." And further it is stated: "In the Roman law the rule now under consideration assumes the form of a maxim: 'An agreement of guaranty made with one person cannot be extended to another person.'"

To the same effect as the above cases is that of *Taylor v. McClung*, 2 Houst. 24, cited by attorneys for defendant in error in their brief, and which is a case very much in point. Our own court has recognized the same principle in the case of *Lee v. Hastings*, 13 Neb. 508.

The case most directly in point is that of *Grant v. Naylor*, 4 Cranch, 224. In this case John and Jeremiah Naylor brought an action against Daniel Grant on a letter or contract of guaranty which was addressed to John and Joseph Naylor. Chief Justice Marshall, in the opinion in the case, says: "That the letter was really designed for ¹⁸⁴ John and Jeremiah Naylor cannot be doubted, but the principles which require that the promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and a wise policy, which this court cannot relax so far as to except from its operation cases within the principles. Already have so many cases been taken out of the statute of frauds which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. . . . On examining the cases which have been cited at the bar it does not appear to the court that they authorize the explanation of the contract which is attempted in this case. This is not a case of ambiguity. It is not an ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John and Joseph Naylor & Co., to either of which this letter might have been delivered. . . . In such a case the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was de-

livered. To admit parol proof to make such a contract is going further than courts have ever gone, where the writing is itself a contract, not evidence of a contract, and where no pre-existing obligation bound the party to enter into it."

In the case at bar the defendant Specht addressed the letter, or contract of guaranty sued upon, to the Crane Bros. Manufacturing Company, and not to the Crane Company. At the time the contract was entered into there was no such corporation in existence as the Crane Company. The contract of guaranty made by Specht was not in any manner for his own benefit, but to oblige, befriend, or aid Lichtenberger, and was such a contract as authorities uniformly hold will be strictly construed, and, when not uncertain, indefinite, or ambiguous, will not be extended in any particular ¹²⁵ beyond the scope of its terms. On January 20, 1890, when the change of the name of the corporation from Crane Bros. Manufacturing Company to Crane Company was made, there was no notice given defendant that such change had been made. The change could not and did not pass or transfer the right of the Crane Bros. Manufacturing Company to the Crane Company to furnish goods to Lichtenberger and rely upon the guaranty of Specht to answer for the debt or default of Lichtenberger. The goods, the value of which it is sought to recover in this action, were furnished to Lichtenberger after the Crane Bros. Manufacturing Company became the Crane Company, January 20, 1890, and this is not an action for the price of goods furnished by the Crane Bros. Manufacturing Company to Lichtenberger, which, under certain circumstances as to assignment, and possibly without, would be a different case and raise another point of question. The instrument containing the guaranty was plain, clear, and definite in its terms, and not in any particular ambiguous, and certainly not as to the person or corporation to whom or which it was addressed. It was a contract of guaranty to and with the Crane Bros. Manufacturing Company, and not the Crane Company, although the persons composing the first may have been identical with those of the second, and the introduction of the letter, showing as it does the guaranty to the Crane Bros. Manufacturing Company, was not competent to, and does not, support the action on the guaranty by the Crane Company, the plaintiff in this case, nor do I think that evidence could be received to show that the Crane Com-

pany had the same officers, and was, under the same management, engaged in the same business, and in the same location as the Crane Bros. Manufacturing Company, or that it had the same stockholders, and merely changed its name, or, if received, that it would alter or affect in any manner the relations or rights of the parties to the action. ¹³⁶ At the time the goods were furnished to Lichtenberger there was no Crane Bros. Manufacturing Company. It had ceased to exist or had become, by change of name, the Crane Company, and Specht could rely upon the exact terms of his contract and demand that his rights and liability be measured by the guaranty as written, signed, and delivered by him, to be bound only for goods furnished to Lichtenberger by the Crane Bros. Manufacturing Company as existing at the time the contract was made and by the name as set forth in his letter. The judgment of the lower court was right, and is affirmed.

CONTRACT OF GUARANTY IS TO BE STRICTLY CONSTRUED, and so as to give effect to the intention of the parties: *Staver v. Locke*, 22 Or. 519; 29 Am. St. Rep. 621, and note.

ORAL EVIDENCE AS TO THE MEANING OF A CONTRACT IS INADMISSIBLE if there is no ambiguity on its face respecting its meaning: *Peet v. Chicago etc. Ry. Co.*, 20 Wis. 594; 91 Am. Dec. 446.

JOSEPH v. SMITH.

[89 NEBRASKA, 259.]

CONTRACTS—STATUTE OF FRAUDS—PROMISE TO PAY THE DEBT OF ANOTHER.

If the leading object of a party who promises to pay the debt of another is to promote his own interests, such a promise, if made on sufficient consideration, is valid, though not in writing. Hence, if one holds the possession of property to secure a lien thereon for a balance of account, but a third party claims a prior lien on the property by virtue of a chattel mortgage, a direct verbal promise by the latter to the former to pay said balance, if the lien claimant will release the property, will support an action against the promisor after such release.

CONTRACT—CONSIDERATION.—A benefit to the promisor is a sufficient consideration for a promise.

JURY TRIAL—INSTRUCTIONS.—If an instruction has been given on a point in controversy in a case, it is not error to refuse to repeat it.

JUDGMENT—REVERSAL.—Error without prejudice is no ground for a reversal of judgment.

Simpson & Sornborger, for the appellant.

J. R. Gilkeson and H. Gilkeson, for the appellee.

200 HARRISON, J. The plaintiff in this action in the lower court (defendant in error here) filed a petition alleging the copartnership of the defendants, and further, that on or about the first day of May, 1887, and for some time prior thereto, this plaintiff was in possession of certain personal property, to wit, about \$750 or \$850 worth of personal property, consisting of horses, mules, work harness, wagons, wheel-scrapers, etc., said property being held by this plaintiff and in the possession of this plaintiff at the said time for the purpose of securing a claim of \$196.30 this plaintiff had against one J. B. O'Connell for feed furnished said horses and mules, for money advanced to said O'Connell by this plaintiff, and for livery furnished said J. B. O'Connell by this plaintiff; that on or about the first day of May, 1887, while said plaintiff was in possession of said property, and while said plaintiff was retaining possession of said property to secure the payment of said \$196.30 from said J. B. O'Connell, defendants John Joseph and William Grafe came to plaintiff and represented to plaintiff that these defendants had a claim of \$500 against said J. B. O'Connell, and that it would be greatly to the advantage of said defendants if said plaintiff would release his lien on said property, and turn the said property over to the said J. B. O'Connell; and said defendant, on condition that said plaintiff would release his lien on said property and turn said property over to said J. B. O'Connell, agreed to assume and pay said amount of \$196.30 due and payable from said O'Connell to this plaintiff; that, relying on the said agreement and undertaking of said defendants, this plaintiff released said lien on said property, and surrendered his possession 201 of said property, and turned said property over to said J. B. O'Connell, and assigned his claim of \$196.30 to the said defendants, and turned the evidence of same over to the said defendants; that on or about January 1, 1891, defendants paid plaintiff \$44.25; that there was still due plaintiff the sum of \$191.65, and interest at seven per cent per annum from March 4, 1891, for which plaintiff prayed judgment. Defendants Joseph and Grafe answered, admitting the existence of the partnership and denied each and every other allegation of the petition. There was a trial to a jury and a verdict for plaintiff in the sum of \$204.13. Motion for a new trial was filed, submitted, and overruled, and judgment was entered on the

verdict for plaintiff, and defendants Joseph and Grafe brought the case to this court on error.

The facts, as they appear from the evidence, are substantially as follows: During the fall, winter, and spring of 1886 and 1887, one John B. O'Connell, a railroad contractor, was working on sections of a railroad then being constructed in and through Saunders county, Nebraska, and while there, and so engaged, had bought supplies of Joseph & Grafe, who were running a general store in Wahoo, in said county, and became indebted to them in a considerable sum. He also had dealings with the plaintiff Smith, then proprietor of a livery and feed stable, and became indebted, to the amount of the account in suit, for the care and feeding of some stock, horses, and mules, and for which plaintiff says O'Connell had given him a verbal lien on the stock and other property, wagons, and scrapers as security for the payment of the account. He states that O'Connell told him he could hold the property until he was paid his bill. On the 15th of March, 1887, O'Connell executed a chattel mortgage to Joseph & Grafe in the sum of \$500 on the horses of which Smith had possession at the time. He alleges Joseph & Grafe made the promise to him to induce him to surrender the possession of the property. Joseph & Grafe ~~had~~ had, it appears, loaned or advanced to O'Connell some money, indorsed some of his paper, and furnished him supplies, and by May, 1887, O'Connell owed Joseph & Grafe about \$800. At the time O'Connell completed his contract on the road he moved all his stock and tools to Wahoo and to the stable of Smith, where they were left and cared for. About this time Smith and O'Connell examined their accounts and determined upon the amount due Smith, and he and Smith, according to the testimony on the part of Smith by himself and witnesses, went to the store of Joseph & Grafe, and there, in a conversation between Joseph and Smith, Joseph stated to Smith that if he would release or surrender the "stock" or "stuff," they (Joseph & Grafe) would pay his bill or account against O'Connell. This conversation is disputed by Joseph, but it has been passed upon by the jury, and it is not for us to disturb their finding. There is no complaint on this point in the brief of plaintiff, and we think, from an examination of the evidence, that the weight of the evidence supports the conversation as given in the testimony of the plaintiff. The testimony discloses that at this time the firm of Joseph &

Grafe had the largest claim against O'Connell, and were very anxious that he should have possession of his stock, scrapers, etc., in order that he might get away, obtain work, and earn money with which to liquidate his indebtedness to the firm; that Smith delivered his account against O'Connell to Joseph & Grafe, and also some time checks which he then held, and released the property or surrendered possession of it. We find O'Connell very soon after with it in Saline county; and that, after he moved the property to Saline county, probably some time in June, 1887, he executed and delivered to Joseph & Grafe a mortgage in the sum of \$700 on the property surrendered by Smith. There was also evidence showing that O'Connell had assigned and delivered the final estimate for labor performed on the road under his contract to Joseph & Grafe, the same, when received by ²⁶² them, to be applied to payment of indebtedness of O'Connell to parties in Wahoo. Whether the claim of Smith was included, and one which was to be paid from this fund, is not very clear. It further appears that Joseph & Grafe received this money. There is some other evidence in the case, but we do not think it necessary that it be here quoted or referred to, as it can have no bearing upon the decision of the points raised. Joseph & Grafe have failed and refused to pay Smith, hence the suit.

The first contention in the case is that the promise of Joseph & Grafe to Smith was within the statute of frauds, therefore void. The case of *Rogers v. Empkie Hardware Co.*, 24 Neb. 653, cited in his brief by defendant in error, is, we think, in point. Parties in business at Wahoo turned property over to the Empkie Hardware Company, or its salesman, in payment of the debt due the company; and Rogers' attorney, being sent to collect a claim against the parties who had turned the goods over to the company, in a conversation with the company's salesman then in possession of the goods, was told by him that if he would not interfere with him in the possession of the goods he would pay the plaintiff's claim out of the first money received from the sale of the goods. This was accepted and acted upon, and afterward the company sold the stock of goods and refused to pay Rogers' claim. It was argued that the promise was within the statute of frauds. The court held on this branch of the case as follows: "A direct promise of an agent of a wholesale mercantile establishment, who is in the possession of the goods of an insol-

vent firm in satisfaction of a debt of his principal, made to an attorney of another creditor of such insolvent firm, to pay a claim held by said attorney against said firm if he will not disturb him in the possession of the goods, is not a promise to answer for the debt of another, and need not be in writing.”; and in the body of the opinion we find the following statement: “The first question presented is whether or not the contract was ²⁶⁴ a promise to pay the debt of another, and therefore necessary to be in writing. The promise is direct—that the salesman would pay the debt if not disturbed. He had at that time more goods in his hands than were necessary to pay the defendant’s claim. His promise was not conditional, but absolute, and for a benefit to be received by the promisor or his principal. In such case the promise need not be in writing.” All the benefit received by the promisor in the above case was that he was not disturbed in his possession by the other party of more goods than were necessary to pay his debt. In the case at bar Smith had possession, and of property other than that covered by the mortgage to Joseph & Grafe, and in order that O’Connell might have the property to enable him to earn sufficient money to pay the debt of Joseph & Grafe (certainly a benefit to the firm), they induced Smith to surrender such possession. To gain possession of the property held by Smith without the trouble and expense necessary to contest his possession, not only of the stock on which they claimed to hold a prior lien, but other articles to which they had no claim, and turn it over to O’Connell, that he might be able to go to work and earn money to be paid on their claim, they make a promise to Smith not to pay Smith’s bill if O’Connell fails to pay it, but a direct and unequivocal promise and undertaking to pay his claim. Their principal aim in it was not so much to further O’Connell’s interests, but their own. If they could obtain possession of the stock and other articles for O’Connell, or have them surrendered to him, he could work and pay their bill, and, if not, the possibility of their ever receiving it was very remote. To secure the possession and to induce Smith to give up the same without trouble and probably litigation and more or less expense the promise was given. Under the rule established in our state the consideration was sufficient and the promise was valid.

In *Fitzgerald v. Morrissey*, 14 Neb. 198, the following ²⁶⁵

rule was announced: "Where the leading object of a party promising to pay the debt of another is to promote his own interests, and not to become guarantor, and the promise is made on sufficient consideration, it will be valid, though not in writing. In such case the promisor assumes the payment of the debt." To the same effect are *Davis v. Patrick*, 141 U. S. 479; *Emerson v. Slater*, 22 How. 28, 43; *Mathews v. Seaver*, 34 Neb. 592; *Muller v. Riviere*, 59 Tex. 640; 46 Am. Rep. 291; *Leonard v. Vredenburg*, 8 Johns. 29; 5 Am. Dec. 317; *Nelson v. Boynton*, 3 Met. 400; 37 Am. Dec. 148; *Williams v. Leper*, 3 Burr. 1886; *Conrad v. Sullivan*, 45 Ind. 180; 15 Am. Rep. 261.

The plaintiff in error excepted to the giving of instruction No. 1, as requested by plaintiff in court below, and alleges it for error, and this is one of the errors insisted upon and argued in the brief for him in this court. This instruction is as follows:

"The jury are instructed that a verbal contract of the pledge of personal property to secure a debt, when the party to whom the pledge is given has possession of the property, is valid and legal, and will be a lien upon the property so pledged so long as it remains in the possession of the party to whom the lien is given. And if, in this case, you find that the said J. B. O'Connell gave the plaintiff in this case a lien on the property described in the plaintiff's petition, and that the said defendants, while the said property was in the possession of the plaintiff, agreed with the plaintiff that they should pay the plaintiff's claim if he would surrender possession of the said property, and that in consideration of the said agreement of the said defendants the plaintiff released the said property and surrendered possession thereof, this would be a valid consideration for the agreement of defendants to pay the said plaintiff, and the said agreement would be binding upon the defendants."

366 This instruction embodies the proposition that the case made in the evidence was not within the statute of frauds, and for this reason is claimed to be erroneous by attorneys for plaintiff in error; but as we have disposed of this question unfavorably or adversely to his contention, it disposes, therefore, of his objection to the above instruction; and we may further add that the court had instructed the jury as to the burden of proof in its instruction No. 8, in connection with which this must be read and construed.

The plaintiff in error offered an instruction numbered 4, which was as follows: "You are instructed that before the plaintiff can recover in this case, he must show by a preponderance of the evidence not only that the defendant promised to pay the debt of O'Connell, but that, in addition to such promise to pay the same, the defendants obtained an advantage by reason of such promise, which they did not before have."

The court refused to give this instruction, which was excepted to by plaintiffs in error, and the refusal to give the instruction is assigned as error. The subject of this instruction was covered by No. 1, asked by defendant in error, and there was no error in such refusal. It has been frequently held by this court that where an instruction has been given on a point in controversy in a case, it is not error to refuse to give another instruction submitting the same in substance on the same point.

It is also urged that the court erred in giving instruction No. 2, requested by defendant in error, which reads as follows: "The jury are instructed that if you find by the evidence that the defendant John Joseph was acting for the firm of Joseph & Grafe, then any contract made in reference to the payment of the plaintiff's claim, if you find any was made, would be binding upon said firm, and both of the defendants would be bound by said contract."

We have already disposed of the question as to whether ³⁶⁷ or not the promise to pay Smith's bill was founded upon any thing which was of benefit, or would forward the interests of Joseph & Grafe, in the affirmative; and the attorneys for the plaintiffs in error in their able brief, on page 9, say on this subject: "Had these acts of one member been such as to advantage the firm, to further its interests, . . . then the act of John Joseph would have been the act of the firm." This, we believe, is correct; and having, as before stated, found that such act benefited the firm, and that the evidence given warranted such a conclusion when construed with the other instructions, especially No. 1, asked by defendant in error and given, we think the instruction was correct.

The court below refused to give instruction No. 3, requested by plaintiffs in error, and this is complained of as error. The instruction was as follows: "The jury are instructed that the mere delivery of an itemized statement of the account of the plaintiff against the man J. B. O'Connell to the defend-

ants will not be in itself sufficient to prove an assignment from the plaintiff to defendant."

' Whether the above is correct or not cannot, we think, affect the result of this case. The court below did not give any instructions in reference to the question of the assignment of the account as alleged in the petition and denied in the answer, and the evidence introduced in regard to its delivery to the plaintiff in error. After careful consideration and much deliberation we are unable to discern any tendency, in the refusal of the court to instruct the jury on this point, prejudicial to the rights of the plaintiffs in error. In order to arrive at the verdict returned by them the jury, from the very nature and component parts of the case, were forced to conclude first that the conversation occurred and the promise was made to pay Smith's claim on surrender of the possession of the property. This was sufficient to sustain the verdict without any consideration of the assignment ²⁶⁸ of the account as one element of the transaction. In other words the question of the assignment was one of the subordinate or collateral elements of the proof, and amounted to nothing without the main elements, on which it depended or to which it was collateral, being first established. In other words there must have been sufficient proved, and the jury must have been convinced of such facts that their verdict on such conclusion would be as it was, for plaintiff (defendant in error), before they reached the consideration of the question of assignment or no assignment in their deliberation, and hence if it was error to refuse the instruction, it was error without prejudice, and does not call for a reversal of the case.

The giving of instruction No. 6 by the court on its own motion is also alleged as error. The following is a copy of the instruction: "If the jury find for plaintiff, you will find for him in the sum of one hundred and ninety-one dollars and sixty-five cents, with seven per cent per annum from March 4, 1891."

We cannot discover wherein the plaintiffs in error are prejudiced in the giving of this instruction. To make it as favorable for the plaintiffs in error as possible, the defendant in error would be entitled to interest on the account from December 1, 1887, or six months after the date of the last item in the account. Taking the last item in the account to be June 1, 1887, which is probably a few days later than it should be fixed, the verdict is by a small sum in favor of the

plaintiffs in error as to amount; and we conclude there was no error in the instruction of which they could complain.

This disposes of all the alleged errors argued in the briefs, and we conclude that the case was fairly submitted to the jury, and the verdict of the jury was right, and the judgment is affirmed.

PROMISE TO PAY ANOTHER'S DEBT IS NOT WITHIN THE STATUTE OF FRAUDS if the leading object of the promisor is not to become surety or guarantor of another, but to promote or subserve some interest of his own: See numerous cases cited in monographic note to *Packer v. Benton*, 95 Am. Dec. 258; and this notwithstanding the effect is to pay or discharge the debt of another: *Elkin v. Timlin*, 151 Pa. St. 491.

RELEASE OF LIEN IS A GOOD CONSIDERATION for a promise to pay the debt: *Smith v. Weed*, 20 Wend. 184; 32 Am. Dec. 525.

RECEIVING A BENEFIT IS A SUFFICIENT CONSIDERATION FOR A PROMISE: *McMorris v. Herndon*, 2 Bail. 56; 21 Am. Dec. 515.

INSTRUCTIONS ON THE SAME POINT NEED NOT BE REPEATED: *Cover v. Myers*, 75 Md. 406; 32 Am. St. Rep. 394, and note.

ERROR WITHOUT PREJUDICE WILL BE DISREGARDED ON APPEAL: *Noss v. Adams*, 107 Mo. 414; 28 Am. St. Rep. 421.

PENNOCK v. DOUGLAS COUNTY.

[39 NEBRASKA, 293.]

MUNICIPAL CORPORATIONS—VOID TAX SALE, RECOVERY OF MONEY.—In the absence of an express statutory provision authorizing it, no municipality can be compelled, either at law or in equity, to refund money received by it from the sale of real estate for taxes, even in cases where the property against which such taxes were levied was not liable therefor. The doctrine of *caveat emptor* applies with full force to the purchaser at such a sale.

Henry W. Pennock, for the appellant.

W. J. Connell and A. J. Poppleton, for the appellee.

293 RAGAN, C. Ames C. Pennock brought this suit in the district court of Douglas county against the city of Omaha, the county of Douglas, and John Rush, the treasurer of Douglas county. The county interposed a demurrer to Pennock's petition on the ground, generally, that it did not state facts sufficient to constitute a cause of action, and, specially, that it appeared from Pennock's petition that the claim sued for therein had been by him presented to the board of supervisors of Douglas county and by them rejected, and that he had not prosecuted an appeal from the order of said super-

visors rejecting said claim. The city of Omaha also demurred to Pennock's petition on the ground that the ²⁹⁴ same did not state a cause of action. There was no appearance by or service upon Rush. The district court sustained the demurrers, and dismissed Pennock's case, and he comes here on appeal. His counsel thus states the facts in this case:

"The petition alleges for first cause of action that in the year 1883 the city council of the city of Omaha created, by ordinance, paving district No. 6, comprising a portion of St. Mary's avenue in said city; that in the year 1884 said city council passed an ordinance providing for the curbing and guttering of said street in said paving district, and levied a tax upon the abutting property to pay for the same; that in the same year said city council passed an ordinance providing for the paving of said avenue in said paving district, and levying a paving tax upon the abutting property to pay for the same; that lot 8 in block 2, in Kountze & Ruth's addition to the city of Omaha, was levied upon for said purpose, and the city treasurer was directed to collect said special assessments as other taxes; that in September, 1885, said city treasurer certified to the county treasurer of Douglas county the amount of said special assessments which were then due and delinquent upon said lot, and said county treasurer, after advertising the same in the manner provided by law, sold said lot to the plaintiff at private tax sale on the twenty-eighth day of December, 1885; that the plaintiff received of said treasurer a certificate of tax sale in the usual form; that the plaintiff paid to the county treasurer the full amount of said special assessments and interest, amounting to \$45.98.

"Some time after said tax sale to the plaintiff, the owner of said lot, with other adjacent property holders, applied to the city council by written petition for relief against said special assessments, on the ground that the same were illegal and void; that said council refused to grant the relief asked; that on the — day of September, 1887, and ²⁹⁵ more than three months before the time of redemption had expired, the plaintiff served the notice required by section 123 of the revenue law for the taking out of a tax deed; that after serving of said notice, and before two years from tax sale had expired, the owner of said lot applied to the district court of Douglas county for a perpetual injunction, restraining the collection of said special assessments and any further pro-

ceedings under said sale; also praying that said assessments be adjudged illegal and void and no lien upon said lot. On the twentieth day of December, 1888, final decree was rendered in said cause granting the request of said plaintiff, and perpetually enjoining plaintiff herein from enforcing his tax sale against said property, and declaring that said special assessments were illegal and void and no lien upon said lot; that no appeal has ever been taken from said decree, and the same is in full force and effect, and that plaintiff's consideration at said tax sale has wholly failed; that afterwards the plaintiff applied to the county commissioners of Douglas county for repayment of the money expended at said sale, which was by said commissioners refused; that afterwards the plaintiff applied to the city council of the city of Omaha likewise for a reimbursement of the money so expended at said tax sale, which was by said city council refused; that plaintiff had used due care and diligence in the purchase of said lot for taxes, and had no means of knowing or reason for suspecting that said lot was not legally and properly assessed for said improvements, and that, through the representations of the city and its officers, he had been induced to purchase at said tax sale; that, by reason of the illegal acts of the city in the premises, the consideration for said sale had entirely failed; that the city council has authority, under a special clause of the statute, to make a supplemental assessment and levy upon the property abutting on St. Mary's avenue, to correct any error, omission, or mistake in the first assessment or levy, and that said city may thus fully reimburse itself in the premises.

296 "Second, third, and fourth causes of action contain similar allegations with reference to adjacent lots bought by the plaintiff for the same special assessments at the same date and under the same conditions.

"Prayer: 1. That the county of Douglas be required to refund to the plaintiff the amount so paid at said void tax sale with interest; 2. That in case said county be held not liable, that John Rush, the then county treasurer of said county, who made said illegal sales, be required to pay said amount with interest; 3. That in case neither the county of Douglas nor John Rush be held liable, the city of Omaha be adjudged to be liable to the plaintiff as for money had and received from the plaintiff; that, in that case, the city be adjudged to pay to the plaintiff the amount so paid by the

plaintiff, with interest at the rate of seven per cent per annum, and for such other relief as may be in accordance with equity and justice."

If appellant's claim is one for which Douglas county was liable, then, to entitle him to recover against the county he should have filed such claim with its county clerk, had it passed upon by the county board of supervisors, or commissioners, and appealed from their decision, if the same was unsatisfactory, to the district court. In no other manner could the district court acquire jurisdiction of a suit against the county, founded on such a claim as the one sued on here by the appellant: Comp. Stats. 1893, c. 18, sec. 37; *Brown v. Commissioners of Otoe County*, 6 Neb. 111; *State v. Commissioners of Buffalo County*, 6 Neb. 454; *Commissioners of Dixon County v. Barnes*, 13 Neb. 294; *Richardson County v. Hull*, 24 Neb. 536. Appellant alleged that he duly filed his claim against Douglas county, and that it was rejected by the supervisors, or county commissioners thereof; but it does not appear from the record before us that appellant has ever appealed from the order rejecting his claim, much less that the present suit is a prosecution of such an appeal. The judgment of ³⁹⁷ the district court, then, dismissing appellant's suit against Douglas county, was right. It may be that Douglas county would have been liable for appellant's claim had he pursued the remedies provided by the statute: Comp. Stats. 1893, c. 77, sec. 131; *Richardson County v. Hull*, 24 Neb. 536; *Roberts v. Adams County*, 18 Neb. 471; *Wilson v. Butler County*, 26 Neb. 676. But that question is not before us, and we express no opinion on the point.

The question presented by this appeal is: In the absence of an express statutory mandate, can a city of the metropolitan class be compelled to refund money received by it from a purchaser of real estate at a sale made thereof by the county treasurer for the purpose of collecting a special assessment or tax levied against such real estate by said city, and for which special assessment or tax said real estate was not liable? The learned counsel for appellant contends that the rule *caveat emptor* does not apply to such a purchaser, and in support of this contention, and that the question stated above should be answered in the affirmative, has furnished us an able and exhaustive brief and argument in which he has cited many authorities. We have carefully examined all the cases cited by him, and it is not to be denied that the contention

of counsel is supported by the decisions of courts whose opinions are entitled to much weight.

The rule contended for by appellant seems to be the doctrine of the supreme court of Iowa. In *Corbin v. City of Davenport*, 9 Iowa, 239, it is said: "The purchaser at an invalid sale of property by a city for taxes may recover of the city the amount of purchase money paid and interest." It does not appear from the opinion that it was predicated upon a statute making cities liable in such cases. Such, also, seems to be the rule in Wisconsin. In *Norton v. Supervisors*, 13 Wis.* 611, 684, it is said: "Where a tax sale is void, the county is liable to the holder of the certificates issued on such sale for the amount paid with interest. *** The statute makes it duty of the treasurer to refund the money in such case on demand to the purchaser or his assigns; but the liability of the county does not depend upon this statute, and whatever remedy it gives is cumulative to the right of the action for money had and received." This case was cited with approval in *Van Cott v. Board of Supervisors*, 18 Wis.* 247, 259.

In *Chapman v. City of Brooklyn*, 40 N. Y. 372, the city of Brooklyn caused an assessment to be levied upon certain lots to pay the expense of grading and paving a certain avenue. The admitted benefits of this improvement to the two lots were assessed against parties who were not the owners of them. By the law in force in such cases, judgment for the amount of the assessment was rendered against the persons so assessed; executions issued on such judgment, and returned unsatisfied. The lots were then put up for sale by the street commissioner, and sold to a purchaser, who paid over the amount of the bid, and received the certificate of sale. The money was transmitted by the street commissioner to the city treasurer. An action was then brought against the city by the assignee of this certificate to recover back the money paid, on the ground "that the assessment proceedings were absolutely void for want of jurisdiction, the assessment not having been made against the owner of the lots." The court held that the assessment was void because not made against the owner of the lots, and, by a divided court, "that the plaintiff could recover on the ground of an entire failure of the consideration."

In *Phillips v. Mayor etc. of Hudson*, 31 N. J. L. 143, the court said: "Where there was a sale [of real estate] to pay

for an improvement in the city of Hudson, and a declaration of sale delivered in pursuance of a void ordinance, *held*, that the purchase money could be recovered back in an action of *assumpsit*” against the city. This case was also decided by a divided court.

299 The foregoing are all the authorities cited by counsel for the appellant which can be said to be squarely in point and support his views. Counsel, however, refers us to the following: *Pettit v. Black*, 8 Neb. 52, *Read v. Merriam*, 15 Neb. 323, and *Merriam v. Hemple*, 17 Neb. 345, as authority for the doctrine for which he argues. These cases, however, do not support appellant’s contention. In each of these cases, while the tax deeds which the purchaser obtained at the tax sale were wholly void, the taxes for which the property was sold were valid liens on the property, and furthermore the decisions in these cases were based on a statute. Counsel also cites us to *Wilson v. Butler County*, 26 Neb. 676; but this was a suit by Wilson against the county, and the opinion is predicated on a statute. Another Nebraska case cited by counsel is *Clark v. Board of County Commrs.*, 9 Neb. 516. In that case Saline county conveyed a tract of land to one Hunt and paid him five hundred dollars in money, in consideration of which Hunt agreed to build a bridge across the Blue river. Hunt assigned his contract to Clark and conveyed him the land. Clark built the bridge and the county accepted it. The title to the lands having failed, Clark sued the county for the value of the bridge, and the court held that he was entitled to recover. But there is a wide distinction between the legal *status* of a purchaser of property sold at a tax sale and that of one who builds an improvement for a county and receives land or other property in payment for such improvement, the title to which fails. Appellant’s case is not within the principles of the case just cited.

Pimental v. City of San Francisco, 21 Cal. 352, *Taylor v. People*, 66 Ill. 322, *Louisiana v. Wood*, 102 U. S. 294, and *Chapman v. County of Douglas*, 107 U. S. 348, also cited by appellant’s counsel, are analogous in principle to *Clark v. Board of County Commrs.*, 9 Neb. 516, and need not be further noticed.

300 As opposed to the rule contended for by appellant’s counsel are *Lynde v. Inhabitants of Melrose*, 10 Allen, 49, where it is said: “If a tax title proves invalid, the purchaser at the collector’s sale cannot maintain an action against the

town to recover back the money paid by him as the consideration of the purchase. . . . No precedent for maintaining such a suit is found, and the plaintiff's counsel rests his argument solely upon the ground that the defendants have received the amount of the tax without consideration. . . . There is a plain distinction between the right of a person to recover from the town the amount of a tax unlawfully assessed upon him and the claim of the purchaser under a collector's deed whose title proves defective. . . . The purchaser is a mere volunteer in the payment of the tax. He has the same means of knowing whether it is legally assessed as the town has. He buys the title without warranty except such covenants as he takes from the collector, and he must rely only upon them. Beyond those covenants, his deed is in the nature of a mere quitclaim for which he has paid what he thought the chance was worth. His speculation may prove very profitable, or wholly unproductive; but no one has taken his property without his consent or with any contract, expressed or implied, to reimburse him if his bargain proves a losing one."

Such is the rule in the state of Indiana. In *Churchman v. City of Indianapolis*, 110 Ind. 259, it is said: "Money voluntarily paid on a demand in the nature of a tax—and a street improvement assessment is such—cannot be recovered back in the absence of an express statutory provision authorizing such a recovery. The doctrine of *caveat emptor* applies as fully to sales upon assessments for street improvements as to any other analogous class of sales. A recital in a deed executed by a city treasurer upon the sale of lands in satisfaction of an assessment for a street improvement that 'it appearing from the records of the common ³⁰¹ council of said city, in the city clerk's office, that the aforesaid lands were legally liable for such assessment,' is not a representation of fact upon which the grantee had a right to rely." To the same effect see *State v. Casteel*, 110 Ind. 174; *Worley v. Town of Cicero*, 110 Ind. 208; *Board of Commrs. v. Armstrong*, 91 Ind. 528; and the *City of Logansport v. Humphrey*, 84 Ind. 467, where it is said: "The purchaser at a city tax sale assumes all risks, and, if the sale proves invalid, has no remedy against the municipality."

This also seems to be the rule at present in New Jersey.

In *Casselberry v. Piscataway*, 43 N. J. L. 353, it is said: "A municipality is not bound to refund the purchase money re-

ceived on a tax sale merely because there has been illegality in the proceedings which defeats the title of the purchaser; . . . the rule of law applicable to such a case is that the municipality is under no obligation to refund the purchase money, because the tax title fails. The purchaser is a volunteer, and buys at his own risk."

This also seems to be the doctrine in California. In *Loomis v. Los Angeles County*, 59 Cal. 456, it is said: "In an action against a county to recover purchase money paid by the plaintiff at a void tax sale, there is no rule of law authorizing plaintiff to recover": See, also, *Harper v. Rowe*, 53 Cal. 233.

This also seems to be the rule in New York, notwithstanding the case of *Chapman v. City of Brooklyn*, 40 N. Y. 372. See *Swift v. City of Poughkeepsie*, 37 N. Y. 511; *Phelps v. Mayor etc. of New York*, 112 N. Y. 216.

Such is the rule in Kansas. In *Sullivan v. Davis*, 29 Kan. 28, it is said: "The rule *caveat emptor* is, except as limited or qualified by express provisions of statute, universally applicable to all purchasers at tax sales": See, also, *Board of Commrs. v. Geis*, 22 Kan. 381; *Sapp v. Commissioners of Brown County*, 20 Kan. 243; *Commissioners of Wabaunsee County v. Walker*, 8 Kan. 431; *Phillips* ³⁰³ *v. Board of Commrs.*, 5 Kan. 412.

In *San Francisco etc. Ry. Co. v. Dinwiddie*, 13 Fed. Rep. 789, it is said: "An assessment made in strict accordance with the provisions of the state constitution relating to the assessment of railroad property, which violates the provisions of the fourteenth amendment to the constitution of the United States, is void. A payment under it is not a payment under duress, but is voluntary, and cannot be recovered."

In Cooley on Taxation, first edition, 328, it is said: "A tax sale is the culmination of proceedings which are matters of record; and it is a reasonable presumption of law that where one acquires rights which depend upon matters of record, he first makes search of the record in order to ascertain whether any thing shown thereby would diminish the value of such rights, or tend in any contingency to defeat them. A tax purchaser consequently cannot be, in any strict technical sense, a *bona fide* purchaser, as that term is understood in the law, because a *bona fide* purchaser is one who buys an apparently good title without notice of any thing calculated to impair or affect it; but the tax purchaser is always deemed to

have such notice when the record shows defects. He cannot shut his eyes to what has been recorded for the information of all concerned, and, relying implicitly on the action of the officers, assume what they have done is legal because they have done it. It is, indeed, a presumption of law that official duty is performed; and this presumption stands for evidence in many cases, but the law never assumes the existence of jurisdictional facts; and throughout the tax proceedings the general rule is that the taking of any one important step is a jurisdictional prerequisite to the next; and it cannot therefore be assumed because one is shown to have been taken, that the officer performed his duty in taking that which should have preceded it."

202 In *Desty on Taxation*, page 850, it is said: "Except as limited and qualified by express statutory provisions, the rule [*caveat emptor*] applies to all purchasers at tax sales; and, if the public has nothing to sell, the purchaser gets nothing. Purchasers are bound to know, at their peril, that the supposed delinquent is in fact delinquent—that he has been lawfully assessed, and has failed to make payment. . . . The purchaser at a municipal sale for taxes buys at his own risk, and at his peril investigates the proceedings. A county does not guaranty tax titles except as the statute may provide, and cannot refund money upon the failure of such titles."

We are urged by counsel for appellant to hold the city of Omaha liable in this case upon moral grounds, but we cannot do so. The city did not ask appellant to purchase at its tax sales. He was a volunteer, with all that that term implies. He bought without warrant or covenant of any kind, and bid what he considered the venture worth; and, under these circumstances and in a case like the present, where there was no fraud, no misrepresentation, and no mistake of the facts, it is well settled, as between individuals, that the purchaser is without remedy in case of failure of title: *Rawle on Covenants for Title*, sec. 321, and cases there cited. In this case appellant knew when he made the purchase that in case of redemption he would receive a return on his investment unusually large. If the owners of the property failed to redeem the same he could, under the statute, foreclose his lien and obtain title to valuable property for a very small part of its actual worth. Appellant claims that he should be given all these advantages for unusual

profits, but at the same time he should be fully indemnified against any risk of loss. In no other line of business, under no other circumstances, would such a claim be made. In the interest of the public revenue, and as an inducement to buy at tax sales, our law presents tempting offers to the speculator; but, until the legislature ²⁰⁴ shall so expressly declare, the courts will not place the responsibility upon cities of refunding money paid by purchasers for property at sales made thereof for taxes: *Budge v. City of Grand Forks*, 1 N. Dak. 309.

A consideration of the authorities reviewed above leads us to the conclusion that the rule *caveat emptor* applies with full force to the purchasers of property at tax sales, and constrains us to the conclusion that, in the absence of a statute therefor, no municipality can be compelled, either at law or in equity, to refund money which it has received from the sale of real estate for taxes, even in cases where the property against which such taxes were levied was not liable therefor. The decree appealed from must be affirmed.

RIGHT TO RECOVER MONEY PAID AT VOID TAX SALE.—Little can be added to what is said in the principal case on this question, as the cases are almost uniform on the proposition, and announce the law to be as there laid down. Cooley and Desty in their works on Taxation also approve the rule. There seems to be no common-law liability of either town, city, county, or state for money received at a void tax sale, and therefore no obligation to refund it. The purchaser at a tax sale is bound to inquire whether the officer making the sale has acted in conformity with the law authorizing it. He assumes all risks and gets either the land or nothing. If the public has no title he gets nothing. He buys upon the faith of his own judgment as to the regularity of the proceedings leading up to the sale, and must abide the consequences. In other words, the purchaser at a tax sale, buying as he does property from a person who is not the owner of it, comes, "strictly and rigidly," within the rule *caveat emptor*; and, if his title fails, he cannot, except by virtue of some statutory provision, recover either the amount paid upon his purchase, or damages for the illegal sale after he has been ejected by the owner. And the maxim applies to all tax sales, whether made for the benefit of a town, city, county, or state: *Hamilton v. Valiant*, 30 Md. 139; *City of Logansport v. Humphrey*, 84 Ind. 467; *McWhinney v. City of Indianapolis*, 98 Ind. 182; *Hilgenberg v. Board of Commrs.*, 107 Ind. 494; *State v. Casteel*, 110 Ind. 174; *Worley v. Town of Cicero*, 110 Ind. 208; *Churchman v. City of Indianapolis*, 110 Ind. 259; *Lyon County v. Goddard*, 22 Kan. 389; *Sullivan v. Davis*, 29 Kan. 28; *Lynde v. Inhabitants of Melrose*, 10 Allen, 49; *Packard v. Inhabitants of New Limerick*, 34 Me. 266; *McCormick v. Edwards*, 69 Tex. 106; *Carter v. Phillips*, 49 Mo. App. 319; *Casselbury v. Piscataway*, 43 N. J. L. 353; *Budge v. City of Grand Forks*, 1 N. Dak. 309; *Loomis v. County of Los Angeles*, 59 Cal. 456; *Graham v. Florida Land etc. Co.*, 33 Fla. 356.

The doctrine of *caveat emptor* applies as fully to sales upon assessments for street improvements as to any other analogous class of sales: *Churchman v. City of Indianapolis*, 110 Ind. 259. The purchaser at a city sale assumes all risk, and, if the sale proves to be invalid, he has no remedy, in the absence of a statute, against the municipality: *City of Logansport v. Humphrey*, 84 Ind. 467; *McWhinney v. City of Indianapolis*, 98 Ind. 182; *Budge v. City of Grand Forks*, 1 N. Dak. 309. A power given to a municipality to sell properly for delinquent taxes, like other powers, can be exercised only in the mode prescribed by statute, if there be such a mode: *City of Logansport v. Humphrey*, 84 Ind. 467.

So with counties. They do not guarantee tax titles, except as the statute may provide for it, and neither the board of commissioners of a county, nor the county treasurer, has any power, unless conferred by statute, to refund money upon a failure of title: *Lyon County v. Goddard*, 22 Kan. 389. In *Loomis v. County of Los Angeles*, 59 Cal. 456, it was held that there was no "rule of law" authorizing the plaintiff to recover, against the county, the purchase money paid by the plaintiff at a void tax sale. In the absence of an express statute the purchaser cannot recover from the county the money paid by him in such a case: *State v. Casteel*, 110 Ind. 174.

The purchaser buys a title without warranty, except such covenants as he takes from the one who sells, and he must rely only upon them. "Beyond those covenants," says Hoar, J., in *Lynde v. Inhabitants of Melrose*, 10 Allen, 49, "his deed is in the nature of a mere quitclaim, for which he has paid what he thought the chance was worth. His speculation may prove very profitable, or wholly unproductive; but no one has taken his property without his consent, or with any contract, express or implied, to reimburse him if his bargain proves a losing one. Where there is no fraud or imposition the sale of land without warranty creates no obligation to return the purchase money in any event." And there is no obligation in equity requiring the owner of land to refund the money paid by a purchaser in pursuance of a sale thereof for state and county taxes, in case the sale proves to be absolutely void, as such payment stands on the footing of a voluntary payment, not made at the request of the owner: *Harper v. Rowe*, 53 Cal. 233.

On the other hand, it has been held in New York that, if the assessment proceedings and sale are absolutely void for want of jurisdiction, by reason of the assessment not having been made against the owner of the lots, the plaintiff may recover on the ground of an entire failure of the consideration for which the money was paid to the city: *Chapman v. City of Brooklyn*, 40 N. Y. 372. In Louisiana a tax sale had been declared a nullity, and an action was instituted to recover the taxes, penalties, costs, etc., that plaintiff had paid out as the price of the property at the illegal sale. On rehearing in *Fishel v. Merceir*, 37 La. Ann. 356, Fenner, J., said: "The decision in *Hopkins v. Daunoy*, 33 La. Ann. 1423, followed in this case, rests upon the equitable principle that all property not exempt is legally bound to bear its quota of equal and uniform taxation; that, although the assessment and other proceedings be void, and the recovery of the tax levied thereunder be thereby temporarily defeated, yet that under the power of reassessment the state and municipalities may, and in the performance of their duty should, take new and valid proceedings for the collection of the tax; that therefore, when the purchaser at a void tax sale has actually paid the taxes he has relieved the property of a charge which, though not legally operative at the moment, was subject to immediate and valid reimposition, and has

thus conferred upon the owner a direct benefit, which equity will not permit him to enjoy at the expense of the purchaser who has paid.

"The manifest justice of this rule approves the wisdom of its adoption and the propriety of its enforcement under all circumstances. It is calculated to repress the vicious tendency of property owners to evade, on technical grounds, their just share of the burdens of government, and to aid the state and subordinate taxing authorities in the collection of their limited and sorely needed revenues.

"But, as we said in the case referred to, the rule has no application to the penalties paid where the assessment was null. The owner was not liable for such penalties, and could not be made liable therefor by any subsequent proceeding.

"Therefore, the right of the purchaser to recover these must depend upon the fact whether or not the assessment was valid. If valid, the penalties were due, although the subsequent proceedings for the sale were defective and illegal.

"The plaintiff in this case has furnished no proof of the validity of the assessment except the recital of the tax deed.

"The constitutional provisions which attach certain presumptions to tax deeds have no application to deeds which have been decreed null and void, as in this case.

"It was, therefore, incumbent on the plaintiff to establish the validity of the assessment as a condition precedent to his right to recover penalties. Having failed to do so, he must be nonsuited as to that portion of his demand."

"The rule" referred to by the learned justice is article 1965 of Voorhies' Revised Civil Code of Louisiana, which reads as follows: "The equity intended by this rule is founded in the Christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land and that which the parties have made for themselves by their contract are silent, courts must apply these principles to determine what ought to be incidents to a contract, which are required by equity." The result of the law in Louisiana is that the purchaser at a void tax sale is entitled to recover from the owner of the property such portion of the price of adjudication as went to the payment of taxes, but not the amount of the costs, penalties, and interest, unless the validity of the assessment is established: *Hopkins v. Dounoy*, 33 La. Ann. 1423; *Fishel v. Mercier*, 37 La. Ann. 356.

To deny the right of the purchaser at a void tax sale to recover even the taxes lawfully assessed upon the land and paid by his purchase has been deemed inequitable in many of the states, upon the ground that the purchaser should at least recover the taxes which the landowner ought to have paid, and which he failed to pay. Accordingly, purchasers at invalid tax sales, and holders of invalid tax deeds, have been given a statutory remedy in many of the states, which entitles such purchasers to a return of the taxes paid by them, and to an amount sufficient to reimburse them for the cost of improvements erected on the land in good faith, and to a lien on the lands to secure such reimbursement, and authorizes them to bring an action to foreclose such lien against the property for the amount paid at the sale, and for the subsequent taxes, and statutory costs. The provisions made differ greatly, and it is impracticable to state them here. But, as a rule, the remedy of the purchaser at a tax sale is wholly statutory, and, unless he can bring his complaint within some provision of the statute, it will be

bad: *Dilgenberg v. Board of Commrs.*, 107 Ind. 494; *McCormick v. Edwards*, 69 Tex. 106. Thus, under the statute of Indiana, the purchaser may recover if the sale is void; but to prove that the sale was void he must show that the land was not liable to taxation, or that the taxes were paid before the sale, or that the description was insufficient: *State v. Casteel*, 110 Ind. 174; *McWhinney v. City of Indianapolis*, 98 Ind. 182. The state does not guarantee tax titles except as statutes may provide for it; and, in the absence of statutory provisions, the purchaser must be content with the title he gets: *Rice v. Auditor General*, 30 Mich. 12. The statute sometimes expressly provides in what cases the rule *caveat emptor* shall not apply in tax sales: *Bredin v. Road Commrs.*, 87 Pa. St. 441. It seems from the principal case, when contrasted with prior cases decided in the state of Nebraska, that a statute, authorizing a tax purchaser to recover money paid at an illegal tax sale, is not to be extended beyond its terms. In the principal case a recovery against a city was denied, but the statute in that state does, in such cases, authorize a recovery against a county: *Roberts v. Adams County*, 18 Neb. 471; 20 Neb. 409. Though the statute provides that moneys paid at an illegal tax sale may be recovered, a special agreement made by the board of supervisors at the time of a tax sale to refund the money, if the sale proves defective, is *ultra vires* and void: *Hyde v. Supervisors*, 43 Wis. 129. So with an offer by a city to refund in such a case: *Chapman v. City of Brooklyn*, 40 N. Y. 372.

HOY v. ANDERSON.

[39 NEBRASKA, 886.]

HOMESTEAD.—The extent of a homestead is to be determined by the value of the homestead claimant's interest therein, and not from the fee simple value of the land.

HOMESTEAD.—IN CASE A VALID MORTGAGE upon a homestead remains unpaid the mortgagor is entitled, as against subsequent judgment creditors, to the statutory exemption as to value, over and above the amount of the mortgage lien.

JUDGMENT—LIEN—HOMESTEAD.—If one resides upon land as a homestead, a judgment recovered against him for a claim which would not bind the homestead, and after the execution and recording of a mortgage upon said land is not a lien upon the premises, though a transcript of such judgment is filed in the district court of the county in which the real estate is situated.

Albert & Reeder, for the plaintiff in error.

J. L. Makeever and E. L. King, for the defendant in error.

387 NORVAL, C. J. Defendant in error commenced an action in the court below against Samuel Maxwell and M. D. Hoy, for the purpose of having two judgments declared not to be liens upon certain premises claimed as a homestead. Defendant in error, Lewis Anderson, is now, and has been for ten years last past, a married man and the head of a

family, residing in Polk county, this state. For three years prior to the instituting of this action he has owned and occupied as a homestead the following real estate, to wit: The northwest quarter of section 1, township 15, range 3 west, containing one hundred and sixty acres, and no more, which premises do not exceed in value two thousand eight hundred dollars. There is now, and has been for three years past, a mortgage on said real estate amounting to twelve hundred dollars, leaving the equity of Anderson in said quarter section not to exceed the value of sixteen hundred dollars. Subsequent to the recording of the mortgage Samuel Maxwell recovered a judgment against Anderson and others, in the county court of Merrick county, for one hundred and sixty-three dollars and sixteen cents, and eleven dollars and fifty cents costs, and on the fifteenth day of December, 1888, a transcript of said judgment was filed in the office of the clerk of the district court of Polk county. One M. D. Hoy obtained a judgment in the county court of Platte county against said Anderson and others in the sum of six hundred and five dollars and eight cents, and thirty-one dollars and fifty cents costs, and on the seventeenth day of September, 1889, said judgment was duly transcribed to the district court of Polk county. Each of the above-mentioned judgments was rendered upon an ordinary debt, and not upon any claim whatsoever which would bind the homestead. Anderson ²⁸⁸ filed his petition in the district court, setting up the foregoing facts. The defendants appeared and filed separate demurrers to the petition, which were overruled, and defendants failing and refusing to answer, the cause was heard upon the petition and evidence, and a decree rendered in favor of plaintiff. Defendant Hoy brings the case to this court for review on error.

The sole question in this case is whether the extent of a homestead in this state is to be determined from the fee-simple value of the land, or from the value of the homestead claimant's interest therein above the mortgages and other valid liens. The question presented is a new one in this court, and calls for a construction of the provisions of our homestead law.

Section 1, chapter 36, of the Compiled Statutes, declares that "a homestead not exceeding in value two thousand dollars, consisting of the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the

same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided."

Section 2 provides that, if the claimant be married, the homestead may be selected from the property of the husband, or from the separate property of the wife, with her consent.

Section 3 reads as follows: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: 1. On debts secured by mechanics', laborers', or vendors' liens upon the premises; 2. On debts secured by mortgages upon the premises, executed and acknowledged by both husband and wife, or an unmarried claimant."

It will be observed that the statute does not limit the right of homestead to any particular estate in land. It does not require that the claimant must be the owner of an estate in fee simple in order to entitle him to the benefits of the homestead law. We are persuaded that any interest in land, coupled with the requisite occupancy by the debtor and his family, is sufficient to support a homestead exemption. In *Giles v. Miller*, 36 Neb. 346, 38 Am. St. Rep. 730, it was ruled that the ownership of an undivided interest in land occupied as a homestead will sustain a claim of exemption from forced sale on execution or attachment as to such interest in the land. It has been held in Dakota, under a statute quite similar to ours, that homestead rights can be claimed in real estate held under a contract of purchase, although all the purchase money has not been paid: *Myrick v. Bill*, 5 Dak. 167. So in Michigan, a homestead can be acquired in land held under a partly paid school-land certificate: *Allen v. Cadwell*, 55 Mich. 8. If an interest in land less than the fee is sufficient to entitle a claimant to the benefits of the provisions of the homestead act, and there can be no doubt of it, it follows logically that the extent of a homestead is to be determined by the value of the claimant's interest in the land, whatever it may be. In case a valid mortgage upon the homestead remains unpaid the mortgagor is entitled, as against subsequent judgment creditors, to the statutory exemption of two thousand dollars over and above the amount of the mortgage lien. That this is the proper construction

to be given to the sections already quoted is made more clear when we consider the language of section 16 of the homestead law, which declares that "if the homestead be conveyed by the claimant, or sold for the satisfaction of any lien mentioned in section 3, the proceeds of the sale beyond the amount necessary to the satisfaction of such lien, and not exceeding the amount of the homestead exemption, shall be entitled, for the period of six months thereafter, to the same protection against legal ^{and} process and the voluntary disposition of the claimant which the law gives to the homestead." Under this section, where a homestead is sold to satisfy a mechanic's or mortgage lien, the proceeds of the sale above the amount sufficient to discharge such lien, to the extent of two thousand dollars, are exempt from execution for the period of six months thereafter. It is reasonable to suppose that the legislature intended in enacting the statute that the extent of the homestead right should attach to the claimant's interest in the land over and above the amount of all valid mortgages or mechanics' liens thereon. This construction we have adopted is not without precedents elsewhere, and certainly is in line with the liberal rule of construction which always obtains in the interpretation of exemption laws. The following authorities have more or less bearing upon the question we have been considering: *Quinn's Appeal*, 86 Pa. St. 447; *Hill v. Johnston*, 29 Pa. St. 362; *Lozo v. Sutherland*, 38 Mich. 168; *Vermont Savings Bank v. Elliott*, 53 Mich. 256.

Applying the foregoing considerations to the case before us, it is clear that Anderson's interest in the land cannot be reached by an ordinary execution. The total value of the quarter section is but two thousand eight hundred dollars, and deducting therefrom twelve hundred dollars, the amount of the mortgage, leaves Anderson's interest less than two thousand dollars. It follows that the transcribed judgments are not liens upon the real estate, and the court below did not err in so decreeing. To hold otherwise would be against the spirit, if not the very letter, of our homestead law.

It is said that the mortgage may in the future be paid off and released, or the land may increase in value, and it is argued from this that plaintiff below was not entitled to the relief prayed for. The decree only determined the rights of the parties at the time it was pronounced. In the event the land should rise sufficiently in value, or the mortgage thereon

be canceled, the judgment creditors would ²⁹¹ be entitled to enforce their judgments against the land, should it remain Anderson's property. The decree is affirmed.

JUDGMENT LIENS ON HOMESTEADS: See monographic note to *Vanstony v. Thornton*, 34 Am. St. Rep. 496; note to *Hodges v. Winston*, 36 Am. St. Rep. 245.

LARSON v. DICKEY.

[39 NEBRASKA, 463.]

CONSTITUTIONAL LAW—TAX DEEDS AS EVIDENCE.—The legislature has the power to make tax deeds *prima facie* evidence that every requirement of the law necessary to their validity has been complied with.

CONSTITUTIONAL LAW—TAX DEEDS AS EVIDENCE.—The legislature has the power to make tax deeds conclusive evidence of compliance with all the requirements of the law which are merely directory, and which pertain to the regulation of the manner of exercising the taxing power, and which requirements it might, in the exercise of its discretion, dispense with entirely.

CONSTITUTIONAL LAW—TAX DEEDS AS EVIDENCE.—The legislature has no power to make tax deeds conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation or sale, divesting the title of property for the nonpayment of taxes.

CONSTITUTIONAL LAW—TAXATION.—The constitution of this state has not committed to the legislature the power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale, divesting the title of property for the nonpayment of taxes. Such determination belongs to the judiciary.

TAX DEED—TREASURER'S SEAL.—In the absence of a statute providing for a county treasurer's seal of office, such officer cannot execute a tax deed of any validity under a statute requiring the execution of such deed to be "under the official seal of his office."

CONSTITUTIONAL LAW—TAX DEED AS EVIDENCE.—It is not within the power of the legislature to make a tax deed conclusive evidence of the fact that the grantee named therein was the purchaser, or his assignee, of the property at the tax sale.

DUE PROCESS OF LAW.—It is beyond the power of the legislature to restrain a defendant in any suit from setting up a defense to an action against him. Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity, when in court, to establish any fact, which, according to the usages of common law or provisions of the constitution, would be a protection to his property. It is not any process which legislative power may devise.

THERE ARE FIXED BOUNDS TO THE POWER OF THE LEGISLATURE OVER THE SUBJECT OF EVIDENCE which must not be exceeded. As to what shall be evidence, and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights.

James B. Meikle and George W. Covell, for the appellant.

Saunders & Macfarland, for the appellees.

⁴⁶⁷ RAGAN, C. During the year 1885, and until October 14, 1886, one Marcus P. Mason owned lots 11 and 12 in block 4, Kilby Place, in the city of Omaha, Nebraska. On said last date Mason sold, and by warranty deed conveyed, said premises to Sophia F. Larson. These lots were assessed for taxes in the name of Mason for the year 1885, and on the sixth day of November, 1886, were sold at the county treasurer's public tax sale for the taxes of 1885, to one Dickey, who afterwards, on the twentieth day of November, 1888, obtained a treasurer's tax deed for the property, based on the sale made thereof in 1886, for the delinquent taxes for the year 1885. This suit was brought in the district court of Douglas county by Mrs. Sophia F. Larson against J. B. Dickey, the holder of the tax deed, and James M. Taylor, his lessee, for the purpose of canceling said tax deed. In her petition Mrs. Larson tendered Dickey the amount which he had paid for the tax title, together with interest and costs. Both parties submitted their title to the court. The court found and decreed that the tax deed was valid, and divested Mrs. Larson of her title to the property. From this decree Mrs. Larson appeals to this court.

Section 86 of the Revenue Act of 1879, chapter 77 of the Compiled Statutes of 1893, provides: "In all cases where taxes are delinquent on any real property, for any preceding year, or years, it shall be the duty of the county clerk, in making up the list for the current year, to enter the amount of the delinquent tax opposite the tract or parcel of real property against which it was charged, in a suitable column or columns, with the year or years in which the same was due, and the amount thereof shall be collected in like ⁴⁶⁸ manner as tax for other real property of that year may be collected."

On the trial in the district court Mrs. Larson offered to prove by competent evidence that when the 1886 tax was extended against this property by the county clerk the delinquent taxes against the same for the year 1885, and for which it had been sold, were not carried forward on the tax-list and entered as delinquent against the property with the taxes assessed thereon for the year 1886. The district court excluded this evidence on the theory, as appears from a copy of the court's opinion found in the brief of counsel for the

appellant, that section 130 of this revenue law made the tax deed conclusive evidence that the requirement of said section 86 had been complied with. Said section 130 is in words and figures as follows:

"SEC. 130. Deeds made by the county treasurer as aforesaid shall be presumptive evidence in all the courts of this state, in all controversies and suits in relation to the rights of the purchaser, his heirs or assigns, to the land thereby conveyed, of the following facts: 1. That the real property conveyed was subject to taxation for the year or years stated in the deed; 2. That the taxes were not paid at any time before the sale; 3. That the real property conveyed had not been redeemed from the sale at the date of the deed; 4. That the property had been listed and assessed; 5. That the taxes were levied according to law; 6. That the property was sold for taxes as stated in the deed; 7. That notice had been served and due publication had, as required in section 123 of this chapter, before the time of redemption had expired. And it shall be conclusive evidence of the following facts: 1. That the manner in which the listing, assessment, levy, and sale were conducted was in all respects as the law directed; 2. That the grantee named in the deed was the purchaser or his assignee; 3. That all the prerequisites of the law were complied with by all the officers who had, or whose duty it was to have had, any part or ~~469~~ action in any transaction relating to or affecting the title conveyed, or purporting to be conveyed, by the deed, from the listing and valuation of the property up to the execution of the deed, both inclusive, and that all things whatsoever required by law to make a good and valid sale, and to vest the title in the purchaser, were done, except in regard to the points named in this section, wherein the deed shall be presumptive evidence only. And in all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially as aforesaid by the treasurer, the person claiming the title adverse to the title conveyed by such deed shall be required to prove, in order to defeat the said title, either that the said real property was not subject to taxation for the year or years named in the deed, that the taxes had been paid before the sale, that the property had been redeemed from the sale according to the provisions of this chapter, and that such redemption was had or made for the use and benefit of persons

having the right of redemption under the laws of this state, or that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell the property; but no person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person or the person under whom he claims title as aforesaid; *provided*, that in any case where a person had paid his taxes, and, through mistake in the entry made in the treasurer's books or in the receipt, the land upon which the taxes were paid was afterwards sold, the treasurer's deed shall not convey the title; *provided further*, that, in all cases where the owner of lands sold for taxes shall resist the validity of such tax title, such owner may prove fraud committed by the officer selling the same or in the purchaser to defeat the ⁴⁷⁰ same, and if fraud is so established such sale and title shall be void."

The learned judge of the district court was right in holding that this section made the tax deed conclusive evidence that the requirements of said section 86 had been complied with; but is this section 130 constitutional, in so far as it makes the tax deed conclusive evidence that the thing was done which it is here sought to prove, and, as a matter of fact, was not done?

At common law it was necessary that one who claimed to have obtained title to property of another under proceedings based upon a neglect of public duty should take upon himself the burden of showing that the law had been complied with by those who had had the proceedings in charge; especially if the proceedings would operate with severity and be in their effects something in the nature of a forfeiture. The law was strict in its requirements that his evidence should exhibit the proceedings, from step to step, and show that each of the safeguards with which the statute had surrounded the delinquent for his protection in this very emergency had been duly observed. This rule of the common law has not been modified by the decisions, and is still recognized and enforced where statutes have not changed it: Cooley on Taxation, 326. It will be observed that this section 130 of our revenue law makes the tax deed *prima facie*

evidence that certain requirements of the revenue law, leading up to the sale of property for taxes, have been complied with, thus casting the burden on the one assailing the validity of a tax deed of showing that such requirements had not been complied with; and said section 130 also makes the tax deed conclusive evidence that every fact existed; that every thing had been done, and every requirement of the law complied with, necessary to the validity of the deed, except those requirements whose performance are made *prima facie* evidence.

It is said by counsel for appellant that section 130 is ⁴⁷¹ repugnant to the constitution, in that, in making the tax deed conclusive evidence of certain matters, it deprives the citizen of his property without due process of law. The question is an intensely interesting one, and we have tried to give it such time and attention as its importance deserves, but it would extend this opinion to an unreasonable length to quote and comment upon all the cases examined in its investigation. I have no doubt, however, that the following propositions are established by the weight of authority in this country.

1. That the legislature has power to make tax deeds *prima facie* evidence that every requirement of the law necessary to their validity has been complied with: Black on Tax Titles, sec. 449, and cases there cited; Cooley on Constitutional Limitations, 458; *Kaley v. Guinn*, 76 Mo. 263; *Abbott v. Lindenbower*, 42 Mo. 162; *Callanan v. Hurley*, 93 U. S. 387.

2. That the legislature has the power to make a tax deed conclusive evidence of compliance with all the requirements of the law which are merely directory, and which pertain to the regulation or the manner of the exercise of the taxing power, and which requirements it might, in the exercise of its discretion, dispense with entirely: Black on Tax Titles, sec. 452, and cases there cited; *Allen v. Armstrong*, 16 Iowa, 508.

3. That the legislature has no power to make a tax deed conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation or sale, divesting the title of the citizen's property for the nonpayment of taxes: *Bannon v. Burnes*, 39 Fed. Rep. 892; *Marx v. Hanthorn*, 30 Fed. Rep. 579; *Abbott v. Lindenbower*, 42 Mo. 162; *Wantlan v. White*, 19 Ind. 470; *White v. Flynn*, 23 Ind. 46; *McCreedy v. Sexton*, 29 Iowa, 356; 4 Am. Rep. 214; *Allen v. Armstrong*,

16 Iowa, 508; *Groesbeck v. Seeley*, 13 Mich. 330; *In re Douglas*, 41 La. Ann. 765.

4. The constitution of this state has not committed to ⁴⁷² the legislature the power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale divesting the title of the citizen's property for the nonpayment of taxes. Such determination belongs to the judiciary.

The authorities establishing the foregoing propositions lead us to the conclusion that the requirement found in said section 86, that the county clerk should enter the delinquent tax of 1885 against these lots on the tax-list of 1886, is one not jurisdictional or vital to the exercise of the powers of taxation or sale, and one that the legislature might have dispensed with altogether, and of the performance of which the legislature could make the tax deed conclusive evidence, and that, therefore, the court did not err in refusing to permit Mrs. Larson to prove that the county clerk did not in fact comply with said section 86.

The next error assigned by the appellant is that the district court erred in admitting in evidence the tax deed sought to be canceled by this suit. The objections made to this deed are as follows: 1. That it does not show where the tax sale was held; 2. That it does not show for the taxes of what year the property was sold; 3. That it does not show for what amount the property was sold; 4. That it is not witnessed; 5. That there is no seal of any court attached thereto; 6. That the deed is not acknowledged; 7. That it does not purport on its face to have been executed by the county treasurer of Douglas county, Nebraska; 8. That it does not show to whom the property was sold; 9. That it is not attested by the seal of any person authorized by law to use a seal. The deed was as follows:

"STATE OF NEBRASKA, {
"Douglas County. }

"WHEREAS, at a public sale of real estate for the nonpayment of taxes, made in the county aforesaid, on the fourth (4th) day of November, A. D. 1886, the following ⁴⁷³ described real estate was sold, to wit: Lots eleven (11) and twelve (12), in block four (4), in Kilby Place addition to the city of Omaha, as surveyed, platted, and recorded;

"AND WHEREAS, the same not having been redeemed from such sale, and it appearing that the holder of the certificate

of purchase of said real estate has complied with the laws of the state of Nebraska necessary to entitle J. B. Dickey to a deed of said real estate:

"Now, therefore, know ye, that I, Henry Bollin, county treasurer of said county of Douglas, in consideration of the premises, and by virtue of the statutes of the state of Nebraska in such cases provided, do hereby grant and convey unto J. B. Dickey, his heirs and assigns forever, the said real estate hereinbefore described, subject, however, to any redemption provided by law.

"Given under my hand and the seal of our court this 20th day of November, A. D. 1888.

"[SEAL] HENRY BOLLIN,
"County Treasurer."

In support of the first objection made by the appellant we are cited to the following cases: *Haller v. Blaco*, 10 Neb. 36; *Howard v. Lamaster*, 11 Neb. 582; *Thompson v. Merriam*, 15 Neb. 498, and *Shelley v. Towle*, 16 Neb., 194. These authorities do say that if a tax deed fails to show that the tax sale was made at the place required by law, that the deed is void; but it must be borne in mind that these decisions were rendered under the revenue law of 1869. Section 56 of that law, as section 109 of the revenue law of 1879, required the county treasurer to hold the sales of lands made by him for unpaid taxes "at the courthouse, or the place of holding court in his county, or at the treasurer's office." But the form of the tax deed prescribed by section 68 of the Revenue Act of 1869 required a recital in such deed of the place where the tax sale was held. This requirement is not in the form of tax deed prescribed by section 127 of the Revenue Act of 1879, ⁴⁷⁴ the section on which the tax deed in suit is based. The cases cited above from this court are, therefore, not applicable to the case at bar.

Again, the subject matter of objections Nos. 1, 2, and 3 as well, embraces facts of the performance of which, according to law, we have seen it was competent for the legislature to make the tax deed conclusive evidence. As these objections assail the deed only on that ground they are untenable.

We will consider objections Nos. 4 and 6 together. The revenue law of 1866 required that a tax deed should be executed by the county treasurer under his hand, and the execution thereof attested by the county clerk with the county seal, and that such tax deed should be acknowledged. By

to be divested by a tax deed. It is said in said section that "the deed so made by the county treasurer shall vest in the grantee the title of the property without further acknowledgment or evidence of such conveyance." Now, every conveyance of real estate can only be recorded when acknowledged, and can only be acknowledged when the signature of the grantor is witnessed or proved. The words "without further acknowledgment ⁴⁷⁷ or evidence," it would seem, ought not in this case to be construed to read: "Without any acknowledgment or evidence of such conveyance"; especially in view of our statutes, by which the holder of a void tax deed is subrogated to the lien of the public for taxes on real estate, and by which the holder is allowed to foreclose his lien in equity against the property, and thus acquire, if the same be redeemed, a large return on his investment, and, if not redeemed, an indefeasible title to the property. Since the decree must be reversed on another ground, we do not decide whether the failure to witness or acknowledge the deed renders it void.

Objection No. 7, made to this tax deed, is untenable. True, the words "of Douglas county, Nebraska" do not follow the signature "Henry Bollin, county treasurer," but the deed is headed "state of Nebraska, Douglas county," and in it is the statement "I, Henry Bollin, county treasurer of said Douglas county," etc. This is sufficient, so far as the objection made is concerned.

We next direct our attention to objections Nos. 5 and 9. The substance of these objections is that the deed of the treasurer shows that it was not executed under the official seal of his office. The copy of the deed in the bill of exceptions recites: "Given under my hand and the seal of our court this 20th day of November, A. D. 1888. [SEAL] Henry Bollin, County Treasurer." It will be observed that this is the exact language of the form of tax deeds provided for by section 127 quoted above from our Revenue Act, and which is, as already stated, a copy of section 221 of the Illinois Revenue Act of 1873. By the statute of Illinois in force when this section 221 was enacted the collector of taxes brought a proceeding or suit in the county court against all the property, and the parties in whose name the same was listed, on which taxes were delinquent, and gave notice by publication in a newspaper that at a certain term of the county court he would apply for judgment against ⁴⁷⁸ such property and persons

for the unpaid taxes, and for an order of the court for a sale of the property. At the term fixed by the notice the taxes against any piece of property remaining unpaid, and, no defense being interposed to the collector's proceeding, the county court rendered judgment against the property for the unpaid taxes and an order that the collector sell. The statutes also made the county court a court of record, and the county clerk the clerk thereof, and required all tax deeds to be executed by the county clerk under the official seal of his office, which seal of the county clerk became and was, by virtue of the statute, the seal of the county court. This explains the words "under the official seal of his office," and the words "the seal of our court," found in section 127 of our law. It is our duty to give effect to this section 127 if possible, but by any construction it makes it the duty of the county treasurer to execute tax deeds under the official seal of his office. But there is no such thing as the county treasurer's official seal of office provided for or recognized by our statutes, and, until the legislature shall provide for an official seal for county treasurers, they cannot execute tax deeds of any validity under the present law. If the legislature had so provided for an official seal for county treasurers, and if this tax deed had been attested by such seal, the court might regard the words "of our court" as surplusage, and thus give effect to the law; but under the name of "construction," we cannot read out of this section the words "under the official seal of his office," for this would be, in effect, legislation. From the copy of the tax deed in the record we do not know what seal or kind of seal was used by the treasurer, but it is wholly immaterial, as he could not lawfully use any. It follows that objections Nos. 5 and 9 were well taken, and should have been sustained.

It remains to consider objection No. 8. It will be observed that said section 130, quoted above, makes the tax deed conclusive evidence of the fact that the grantee named ⁴⁷⁹ in the deed was the purchaser, or his assignee, of the property at the tax sale. Is it within the power of the legislature to make this tax deed conclusive evidence of such fact? We do not think it is. Suppose this property had been sold to John Doe and a certificate of sale issued to him, and the same had been lost or stolen, and an indorsement of his name forged thereon under a false assignment of the certificate to Richard Roe, and he had presented the certificate,

and obtained the tax deed. In a suit by Doe to recover this land no lawyer would contend that the tax deed would be conclusive evidence for Roe of his rightful ownership, nor that the legislature could make it such. We apprehend that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a defense to an action against him. Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity, when in court, to establish any fact, which, according to the usages of common law or provisions of the constitution, would be a protection to his property: *Wright v. Cradlebaugh*, 3 Nev. 341. There are fixed bounds to the power of the legislature over the subject of evidence, which must not be exceeded. As to what shall be evidence and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights: Cooley's Constitutional Limitations, 4th ed., 457. While the courts should treat with great respect the enactments of the legislative department of the government, yet the courts, which stand as the last resort of the citizen, and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even a legislature cannot do. Due process of law is not any process which legislative power may devise: *Bannon v. Burnes*, 39 Fed. Rep. 892; *Wantlan v. White*, ⁴⁸⁰ 19 Ind. 470. Does it alter the case that the suit is by the owner whose title is sought to be divested by tax deed? This deed is, as we have already seen, void for several reasons, but, under our statute, the lawful owner of it is entitled to a lien on this property for taxes paid at the sale and since. Is this deed conclusive evidence that this holder is the one entitled to such lien? Had Dickey brought this suit to foreclose his lien, alleging his tax deed to be void, and Mrs. Larson had answered denying, as she might lawfully have done, Dickey's ownership of the lien, would this tax deed have been conclusive evidence that Dickey was the lawful owner? We think not. It follows that the decree of the district court must be reversed and the cause remanded, with instructions to that court, on payment by Mrs. Larson of the taxes and expenses, the tender of which was made in her petition, to enter a decree canceling the said tax deed

and lease of the appellees, and quiet and confirm the title to said real estate in appellant.

Reversed and remanded.

CONSTITUTIONAL LAW—EVIDENCE—TAXES.—Power of the legislature to make tax deeds *prima facie* evidence of title: See cases cited in note to *People v. Cannon*, 36 Am. St. Rep. 683, 687. As to effect of recitals in tax deed, see *Miller v. Miller*, 96 Cal. 376; 31 Am. St. Rep. 229, and note. Concerning tax deeds as evidence of title generally, see *Hurd v. Brisner*, 3 Wash. 1; 28 Am. St. Rep. 17, and note.

CONSTITUTIONAL LAW.—EVIDENCE.—Legislative power over the subject of evidence generally: *People v. Cannon*, 139 N. Y. 32; 36 Am. St. Rep. 668, and monographic note thereto.

CONSTITUTIONAL LAW.—DUE PROCESS OF LAW requires that a person shall have an opportunity to defend: *Doyle, Petitioner*, 16 R. L. 537; 27 Am. St. Rep. 759. It requires that every person must have the right to resort to the courts for redress under substantially the same terms: Note to *State v. Goodwill*, 25 Am. St. Rep. 877.

EDWARDS v. REID.

[89 NEBRASKA, 645.]

TO PROVE ABANDONMENT OF A HOMESTEAD there must be shown an intention to abandon it and an actual abandonment.

TO ESTABLISH ABANDONMENT OF A HOMESTEAD the evidence must show not only that the party removed from the homestead, but that he did so with the intention of not returning, or that after such removal he formed the intention of remaining away.

HOMESTEAD—ABANDONMENT OF.—Removing from a homestead and residing elsewhere temporarily for the purpose of business, health, or pleasure, does not work an abandonment of the homestead unless there is coupled with such removal an intention not to return, or there is formed, after removal, an intention of remaining away.

HOMESTEAD—ABANDONMENT OF.—Evidence that a man and wife removed from their farm to a neighboring town in which they lived for several years, and in which the man pursued the business of shoemaking; that they left on the farm the greater part of their household goods and all of their stock and farming utensils; that they put a son in charge of the property; and that the wife divided her time between the farm and her abode in town, doing the laundry work and some of the cooking for herself and husband on the farm, does not show that they left with the intention of not returning, and their removal to, and residence in, town did not, therefore, work an abandonment of the farm as a homestead.

FRAUDULENT CONVEYANCE—NOTICE TO PURCHASER.—To invalidate a conveyance upon the ground that it is fraudulent as to creditors, it must be proved that the purchaser had notice of such facts tending to show a fraudulent purpose on the part of the grantor as would put a person

of ordinary prudence on inquiry, and that the purchaser participated in such purpose.

FRAUDULENT CONVEYANCE—ANNULMENT OF, BY DECREE, WITHOUT FINDINGS.—In a suit by a creditor to set aside a conveyance of real estate on the ground that it was made with defendant's knowledge, to defraud the plaintiff, it is error to decree an annulment of defendant's title without either a general or a special finding against him.

APPEAL—REVIEW OF FINDINGS.—A finding of fact made by a jury or trial judge will not be disturbed by the appellate court if it is supported by competent evidence.

APPEAL—DECREE, REVERSAL OF.—If there is no evidence to support the decree of the trial court it will be reversed on appeal.

N. H. Bell and M. B. Reese, for the appellants.

Simpson & Sornborger, for the appellees.

646 RAGAN, C. The evidence before us shows that in the year 1881 one Alfred Reid purchased the west half of the southeast quarter of section 25, in township 15 north, and range 7 west, in Saunders county, Nebraska, and about the year 647 1884 moved upon, improved, and began farming and occupying said land as the homestead of himself and family. Some time after this he conveyed the land to his wife, Sarah A. Reid. That he was a shoemaker by occupation, and being unable, on account of poor health, to do the work on the farm, about the year 1886 he rented a building in Wahoo, to which he and his wife removed a part of their household goods, and used this building as their temporary home and Mr. Reid's shoe-shop. At the time Mr. and Mrs. Reid came to Wahoo they left their farm in charge of a son, and left also on the farm all their stock and farming utensils, and the greater part of their household goods. Mrs. Reid divided her time between the farm and her abode in Wahoo, a few miles distant. She did the laundry work and some of the cooking for herself and husband on the farm. Thus matters stood until August, 1887, when Mr. Reid died. On November 1, 1887, Mrs. Reid sold and conveyed the farm to her daughter, Mrs. Starks, the consideration being six hundred dollars, evidenced by two notes of Mrs. Starks of three hundred dollars each; the assumption by her of mortgages on the land amounting to twelve hundred dollars, and the promise to provide her mother with a home, she being then about fifty-two years of age. In February, 1889, Mrs. Reid sold her property on the farm, and the daughter rented the land for that year for cash rent. On January 30, 1890, Mrs. Starks and her husband sold and conveyed the land to one

Krailick. On July 27, 1889, one Olof Berggren recovered a judgment against Mrs. Reid and one C. M. Frey, her son by a former husband, for ninety dollars and ninety-five cents. A transcript of this judgment was filed and docketed in the office of the clerk of the district court of Saunders county on January 13, 1890. November 1, 1887, Edwards & Castle recovered a judgment in the county court of Saunders county against Mrs. Reid for eighty dollars and eighty cents, and on February 14, 1888, a transcript of this judgment was filed and docketed in the office of the clerk of the district court of Saunders county. ⁶⁴⁸ Executions having been issued and returned unsatisfied, Edwards & Castle and Berggren, in March, 1890, each brought suit in equity against Sarah A. Reid, Abbie A. Starks, and Joseph Krailick, alleging that the conveyance from Mrs. Reid to Mrs. Starks was made and received without consideration, and for the fraudulent purpose of hindering and delaying Mrs. Reid's creditors in the collection of their debts; and alleging that Krailick's interest in the land was acquired with knowledge of Mrs. Reid's interest in the land and the existence of plaintiff's judgment.

The answer of the parties made defendants and the replies thereto made the following issues: 1. Whether the conveyance from Mrs. Reid to Mrs. Starks was made and accepted in good faith and for a valuable consideration; 2. Whether Krailick was an innocent purchaser; 3. Whether the land at the time it was conveyed to Mrs. Starks by Mrs. Reid was the latter's homestead. The court found and decreed the issues for the complainants, the cases having been consolidated and tried together, and the defendants below bring the case here on appeal.

1. Was the conveyance from Mrs. Reid to Mrs. Starks made and accepted without consideration and with a fraudulent purpose? As to the consideration, the evidence is that Mrs. Starks assumed twelve hundred dollars of encumbrances on the land, gave her notes for six hundred dollars, and promised to provide the grantor a home. The land was worth at the time about two thousand six hundred dollars. This was, as between the parties, a good consideration; or, to express it differently, it was not a conveyance wholly without consideration. As to the intent with which this conveyance was made and accepted, for the purposes of this opinion we may disregard Mrs. Reid and her intentions in making the conveyance. If her purpose was fraudulent, and we do not wish

to be understood as saying that this record discloses that it was, still, to invalidate the conveyance, Mrs. Reid's fraudulent purpose and intent must have been known to and participated in by ⁶⁴⁹ Mrs. Starks: *Hedman v. Anderson*, 6 Neb. 393; *Smith v. Schmitz*, 10 Neb. 600; *Keith v. Heffelfinger*, 12 Neb. 497; *Burley v. Millard*, 11 Neb. 286; *Crabb v. Morrissey*, 31 Neb. 161; *Spring Lake Iron Co. v. Waters*, 50 Mich. 13. Or, Mrs. Starks must have had notice of such facts, tending to show fraudulent purposes on the part of Mrs. Reid as would put a person of ordinary prudence on inquiry: *Temple v. Smith*, 13 Neb. 513; *Bollman v. Lucas*, 22 Neb. 796. There is no evidence in this record which shows, or tends to show, that Mrs. Starks, at the time she took the deed, knew, or had any reason to suspect, that Mrs. Reid was indebted to any one; nor can such an inference be reasonably drawn from any or all the testimony. The evidence, and all the evidence on the subject, is that Mrs. Starks knew nothing of her mother's indebtedness until after the sale and conveyance of the land to Krailick, nor was any attempt made to show the contrary. Indeed, it would seem from the record, although not expressly so stated, that Berggren's debt was not contracted until 1889. His judgment before the justice of the peace was rendered one year and nine months after, and his transcript thereof filed two years and two months after, the date of the conveyance from Mrs. Reid to Mrs. Starks was recorded. We think, therefore, the decree, in so far at least as it finds that Mrs. Starks accepted this conveyance with intent to defraud her mother's creditors, or with knowledge or notice that her mother intended by the conveyance to defraud her creditors, is without any evidence to support it.

2. We come now to the consideration of that part of the decree of the district court in and by which the conveyance from Mrs. Starks to Joseph Krailick was set aside. There is no general finding in favor of appellees or against appellants; nor is there any special finding as to whether Krailick was or was not a *bona fide* purchaser of this land, nor even that he knew of appellees' claims before paying the purchase money to Mrs. Starks, as appellees allege in ⁶⁵⁰ their petition. The court found specially that the conveyance from Mrs. Reid to Mrs. Starks was made and accepted without consideration, and with the intent to defraud Mrs. Reid's creditors; and, without more ado, proceeded to decree that not only that conveyance, but the one by Mrs. Starks to Krai-

lick be set aside. The only issue in the case so far as Krailick was concerned was whether he was a *bona fide* purchaser of the property, and it was error for the court to pronounce a decree annulling his title without either a special or a general finding against him: Code Civ. Proc., sec. 297; *Sprick v. Washington County*, 3 Neb. 253; *Smith v. Silvis*, 8 Neb. 164; *Foster v. Devinney*, 28 Neb. 416. This decree, then, against Krailick cannot stand, but in view of the disposition we have decided to make of the entire case, we shall not send it back for a retrial. In view of the evidence, or rather the absence of evidence, in the record, a finding of the court against Krailick would not avail to support the decree. There is no pretense that Krailick had any knowledge or notice of Mrs. Reid's debts, or the alleged fraudulent intent or purpose of Mrs. Reid and Mrs. Starks in the matter of the conveyance of the land at the time he bought of Mrs. Starks; nor that he did not pay full consideration for the land. The only claim made against him is that before he paid over the purchase money he learned of appellees' debts and claims in the premises. It appears from the evidence that Krailick bought the land prior to 1890, and took a bond for a deed; that Mrs. Starks' conveyance to him is dated January 3, 1890; that Krailick borrowed the money of or through a loan company to pay Mrs. Starks, and left the money in the bank for her, and so advised her, and that when she called for the money the bank refused to pay it over unless appellees' claims were paid. In short, there is no evidence before us from which the court would have been justified in finding that Krailick was any thing other than a *bona fide* purchaser of this land, with all that that term implies.

651 3. The controlling factor in this case, however, is that at the date Mrs. Reid conveyed this land to Mrs. Starks it was Mrs. Reid's homestead, and therefore not susceptible of fraudulent alienation. The contention of appellees is, that, because Mrs. Reid and her husband left the farm and resided in Wahoo, they thereby abandoned the homestead. All the evidence is that they left it temporarily, and the evidence does not support the court's conclusion, if it made such, that they abandoned the homestead; i. e., that they left it with the intention of not returning. The rule is, that, to establish abandonment of a homestead, the evidence must show not only that the party removed from the homestead, but that he did so with the intention of not returning, or that after

such removal he formed the intention of remaining away: *Eckman v. Scott*, 34 Neb. 817; *Gouhenant v. Cockrell*, 20 Tex. 98. In *Duffey v. Willis*, 99 Mo. 132, defendant left his homestead for several years, doing business in other places part of the time. The homestead property was rented from month to month, and was at one time vacated by the tenant; and defendant then intended to return to it, but was prevented by his business. There was evidence that defendant's residence elsewhere was temporary, and that he intended to return. He acquired no new home elsewhere. The supreme court of Missouri held that these facts did not work an abandonment of the homestead: See, also, *McFarland v. Washington* (Ky., Sept. 20, 1890). A case very like the one at bar is found in *Kenley v. Hudelson*, 99 Ill. 493, 39 Am. Rep. 31. It is said in the opinion in that case: "It appears from the evidence that complainant resided on the premises about six years until February, 1876, when she rented to a tenant and moved to Louisville, a town about three miles distant, for the purpose of educating an invalid child. At the time she moved she expressed an intention to return. When the lease was made she reserved the right to move back at the end of the year. She did not move all her personal property away. She left farming ⁶⁵² implements, a loom, spinning-wheel, bedsteads, etc. From the testimony it is apparent complainant did not abandon the homestead. . . . Where a person leaves a place which is occupied as a homestead, for a temporary purpose, intending to return, . . . it cannot be held that the homestead has been abandoned." The cases agree in holding that removing from a homestead and residing elsewhere for the purpose of business, health, or pleasure does not work an abandonment of the homestead, unless coupled with such removal is the intention not to return. We reach the conclusion then, and so decide, that the removal of Mrs. Reid and her husband from the farm to Wahoo and their residence there did not work an abandonment of their homestead. The unbending rule of this court is that a finding of fact made by a jury or trial judge will not be disturbed by this court if supported by competent evidence; that this court will not weigh conflicting evidence, nor pass judgment upon the credibility of witnesses; but we place the decision in this case, not on the ground that the district court's decree is not supported by sufficient evidence, nor that it is contrary to the evidence, nor that it is contrary to the weight of the evi-

dence, but we predicate our conclusion expressly on the ground that there is no evidence in the record from which the trial court could find that Mrs. Reid and her husband left their home with the intention of not returning. The decree appealed from is reversed, and a decree will be entered in this court dismissing the cases of the appellees at their costs.

Judgment accordingly. —

ABANDONMENT OF HOMESTEAD IS A QUESTION OF BOTH ACT AND INTENT: *McDannell v. Ragsdale*, 71 Tex. 23; 10 Am. St. Rep. 729 and note; note to *McDermott v. Kernan*, 7 Am. St. Rep. 866.

WHAT REMOVAL WILL NOT CONSTITUTE ABANDONMENT OF HOMESTEAD. See note to *Weaver v. Nugent*, 13 Am. St. Rep. 800; *Boot v. Brewster*, 75 Iowa, 631; 9 Am. St. Rep. 515, and note; *McDermott v. Kernan*, 72 Wis. 268; 7 Am. St. Rep. 864, and note; *Fyffee v. Beers*, 18 Iowa, 4; 85 Am. Dec. 577; *Franklin v. Coffee*, 18 Tex. 413; 70 Am. Dec. 292; *Taylor v. Boulware*, 17 Tex. 74; 67 Am. Dec. 642.

FRAUDULENT CONVEYANCES.—As to effect of participation or knowledge by third person purchasing, and as to what is knowledge of facts sufficient to put on inquiry, see monographic note to *State v. Mason*, 34 Am. St. Rep. 398, 399.

A TRANSFER OF A HOMESTEAD CANNOT BE FRAUDULENT AS AGAINST CREDITORS OF THE GRANTOR, because they have no right to resort to it for the payment of their demands: *Pipkin v. Williams*, 57 Ark. 242; 38 Am. St. Rep. 241; *Hodges v. Winston*, 95 Ala. 514; 36 Am. St. Rep. 241, and note; *Ketchin v. McCarley*, 26 S. C. 1; 4 Am. St. Rep. 674.

CONCLUSIONS REACHED BY THE TRIAL COURT UPON QUESTIONS OF FACT will be sustained by the supreme court, unless there is no testimony to sustain them, or they are manifestly against the weight of the evidence: *Sullivan v. Suwong*, 36 S. C. 287; 31 Am. St. Rep. 865, and note.

SINGER MANUFACTURING COMPANY v. FLEMING.

[89 NEBRASKA, 679.]

CONSTITUTIONAL LAW—STATUTE EXEMPTING WAGES—TITLE OF ACT—CLASS LEGISLATION.—It is sufficient if the title of an act, by general language, fairly expresses its subject matter, and the act applies to every one who falls within the purview of its provisions. Hence, "an act to provide better protection for the earnings of laborers, servants, and other employees of corporations, firms, or individuals, engaged in interstate business," is not unconstitutional, either as being broader than its title, or as being prohibited class legislation.

CONSTITUTIONAL LAW—STATUTE EXEMPTING WAGES—PENALTY.—An act allowing one to recover money wrongfully taken from him, together with costs, expenses, and a reasonable attorney's fee, awards damages which are purely compensatory. Hence, an act exempting from attach-

ment and execution the wages "of laborers, servants, and other employees of corporations, firms, or individuals engaged in interstate business," and which contains such a provision, is not unconstitutional as imposing a penalty for the benefit of an individual.

CONSTITUTIONAL LAW—"FULL FAITH AND CREDIT"—CONFLICT OF LAWS—EXEMPTION LAWS.—The "full faith and credit" clause of the federal constitution requires not only that full faith and credit shall be given to the judicial proceedings of another state, but also that full faith and credit shall be given to the public acts of such state. Hence, if the exemption laws of the state of Nebraska are disregarded in judicial proceedings in the state of Iowa, and relief is sought by the injured party in Nebraska, such clause does not require the courts of Nebraska to sustain the courts of Iowa in overreaching their jurisdiction.

CONSTITUTIONAL LAW—STATUTES—PART OF ACT INVALID, EFFECT OF.—Though part of an act is invalid the whole act is not therefore unconstitutional, unless it appears from an examination of the act itself that the invalid portion was designed as an inducement to pass the valid portion, so that the whole taken together will warrant the belief that the legislature would not have passed the valid portion alone.

ATTACHMENT—CONFLICT OF LAWS—FOREIGN CORPORATIONS.—If a contract is made, and is performable, in the state of Nebraska, a foreign corporation having a place of business in that state, and which institutes in another state attachment proceedings, and seizes the earnings of a citizen of Nebraska, is subject to the operation of a Nebraska statute exempting such earnings from attachment.

ATTACHMENT—CONFLICT OF LAWS—EXEMPTION—SITUS.—There is a marked distinction between the *situs* of a chose in action for the purpose of jurisdiction, and its *situs* for determining the rights of the parties thereto. Hence, if money is earned in the state of Nebraska by a resident thereof, and is payable there, a proceeding by foreign attachment in the state of Iowa, seizing and applying such earnings to the payment of defendant's debt, must be treated as within the jurisdiction of the Iowa courts, but the *situs* of said earnings for the purpose of determining the right to exemption is Nebraska.

Breckenridge, Breckenridge & Crofoot, for the appellant.

Kennedy, Gilbert & Anderson, for the appellee.

¶ IRVINE, C. The plaintiff in error is a corporation organized under the laws of the state of New Jersey. It has a place of doing business, styled a "general agency," at Denver, Colorado. ¶ It has also agencies in Iowa and Nebraska, and does business in both of these states. The agents there report to the general agent at Denver. The defendant in error is a resident of Nebraska, the head of a family, and an employee of the Union Pacific Railway Company, whose lines extend into both Iowa and Nebraska. Fleming bought from the Singer company a sewing-machine upon credit. The agent of the Singer company in Omaha, after some efforts to collect the bill, returned it to the general

agent at Denver, who in turn sent it to the agent in Council Bluffs, Iowa. The agent at Council Bluffs brought an action in Pottawattamie county, Iowa, against Fleming on behalf of the Singer company, proceeding by process of foreign attachment, and garnished the Union Pacific Railway Company. The result of this proceeding was that wages of Fleming to the amount of thirty-eight dollars and five cents, due him from the railroad company, were seized by the Iowa court, and appropriated to the payment of the judgment there rendered against Fleming. Fleming then instituted this action in Douglas county, Nebraska, under sections 531 c, 531 d, 531 e, and 531 f, of the Code of Civil Procedure to recover from the Singer company the debt so garnished, with costs, expenses, and attorney's fees. The wages reached by garnishment were earned within sixty days prior to the commencement of the action in Iowa. Judgment was rendered in favor of Fleming in the district court of Douglas county in the sum of ninety-five dollars and fifty-five cents, and costs, from which the Singer company prosecutes error. No question is raised as to the sufficiency of evidence to support a judgment for that amount, but the judgment is sought to be reversed upon three grounds: 1. That the statute under which the action was brought is contrary to the constitution of Nebraska; 2. That it conflicts with section 1 of article 4 of the constitution of the United States, requiring that full faith and credit shall be given in each state to the public ~~acts~~ acts, records, and judicial proceedings of every other state; 3. That if the law be constitutional, it does not apply to foreign corporations.

The statute referred to is as follows:

"SEC. 531 c. That it be, and is hereby declared, unlawful for any creditor of, or other holder of any evidence of debt, book account, or claim of any name or nature against any laborer, servant, clerk, or other employee of any corporation, firm, or individual, in this state, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill, or debt of any name or nature whatever, to any person or persons, firm, corporation, or institution, or to institute in this state or elsewhere, or prosecute, any suit or action for any such claim or debt against any such laborer, servant, clerk, or employee by any process seeking to seize, attach, or garnish the wages of such person or persons earned within sixty days prior to the commencement

of such proceeding for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions.

"SEC. 531 d. That it is hereby declared unlawful for any person or persons to aid, assist, abet, or counsel a violation of section one of this act for any purpose whatever.

"SEC. 531 e. In any proceeding, civil or criminal, growing out of a breach of sections one or two of this act, proof of the institution of a suit or service of garnishment summons by any persons, firm, or individual, in any court of any state or territory other than this state, or in this state, to seize by process of garnishment, or otherwise, any of the wages of such persons as defined in section one of this act, shall be deemed *prima facie* evidence of an evasion of the laws of the state of Nebraska, and a breach of the provisions of this act on the part of the creditor or resident in Nebraska causing the same to be done.

"SEC. 531 f. Any persons, firm, company, corporation, or ~~and~~ business institution guilty of a violation of sections one or two of this act shall be liable to the party injured through such violation of this act, for the amount of the debt sold, assigned, transferred, garnished, or sued upon, with all costs and expenses and a reasonable attorney's fee, to be recovered in any court of competent jurisdiction in this state, and shall further be liable by prosecution to punishment by a fine not exceeding the sum of two hundred dollars and costs of prosecution."

1. Three arguments are made upon the proposition that the statute is in conflict with the constitution of Nebraska. In the first place, it is said that the act is broader than its title. The title is as follows: "An act to provide better protection for the earnings of laborers, servants, and other employees of corporations, firms, or individuals engaged in interstate business." We are somewhat at a loss to appreciate the argument based on this proposition. It seems to be the theory of counsel that that portion of the act which provides for the recovery of the debt, costs, expenses, and attorney's fee, and which enacts a penalty for the violation of the law is not expressed in the title. These features are not distinctly expressed, but the title to the act need not amount to an analysis or complete abstract of its text. It is sufficient if the title, by general language, fairly expresses its subject matter. Where a bill has but one general object, it will be sufficient if the subject is fairly expressed in the title: *People*

v. *McCallum*, 1 Neb. 182; *State v. Ream*, 16 Neb. 681. The title of this act is comprehensive. Merely to declare the doing of certain acts unlawful would be nugatory, unless the act itself or other provisions of the law provided a redress for injuries inflicted by reason of its violation. Without the section providing a remedy the act would not provide "for the better protection of the earnings" of the persons sought to be protected. Both a substantial enactment of law and a remedy for its violation are fairly included in the title, and ~~and~~ the act would not be complete in the absence of either provision.

It is next urged that the act is unconstitutional, because imposing a penalty which does not go to the school fund. The last section of the act undertakes to provide two remedies. One is that the person violating it shall be liable by prosecution to punishment by fine. It is not necessary to here consider whether that portion of the act is valid. If it is, the fine imposed is like all other fines in criminal cases, and is not subject to the objections urged. If it be not valid, the whole act is not therefore unconstitutional. Where a part of an act is void and a part in its nature valid, the whole act is not void, unless it appears from an examination of the act itself that the invalid portion was designed as an inducement to pass the valid, so that the whole, taken together, will warrant the belief that the legislature would not have passed the valid portion alone: *State v. Lancaster County*, 6 Neb. 474; *State v. Lancaster County*, 17 Neb. 85; *Trumble v. Trumble*, 37 Neb. 340. But counsel say the provision permitting the recovery not only of the debt, but of costs, expenses, and attorney's fees is in the nature of a penalty; and we are cited upon that subject to *Atchison etc. Ry. Co. v. Baty*, 6 Neb. 37; 29 Am. Rep. 356. In that case an act was held void because it sought to give to the owner of livestock injured upon a railroad double the value of his property. This double recovery was clearly in the nature of a penalty. It had no element of compensation, but, in the statute we are considering, the damages awarded are purely compensatory. Nothing is allowed by way of vindictive damages or as a penalty, but the injured party is made whole by being permitted to recover the amount of money wrongfully taken from him, together with the exact costs and expenses by him incurred, and a reasonable attorney's fee, which is also an item of expense for which he should be compensated, and which, probably, would have been in-

cluded as costs and ⁶⁸⁶ expenses even though not otherwise expressed. The law is for none of the reasons urged in conflict with the constitution of Nebraska.

2. Is the act in conflict with the constitution of the United States? It is said in support of this proposition that the courts of Iowa have held that a nonresident of Iowa or a foreign corporation may have an attachment in that state against a nonresident upon precisely the same grounds and upon the same conditions as a resident. The case of *Mooney v. Union Pac. Ry. Co.*, 60 Iowa, 346, is cited as sustaining that contention. The case cited certainly goes that far; and that case and later cases which might have been cited carry the doctrine further, and go to the extent of holding that a citizen of Nebraska may sue another citizen of Nebraska in the courts of Iowa, obtain jurisdiction by attaching and garnishing the wages earned by defendant in Nebraska, and there payable to him by a railroad company which happens to operate in both states; and that in such case the defendant, being a nonresident of Iowa, is not entitled to the benefits of the Iowa exemption laws, and that the Iowa courts will not, even upon principles of comity, give effect to the Nebraska exemption laws, and that by such a device the defendant is absolutely deprived of his exemptions under the law of either state. The question presented is whether the courts and the legislature of this state are required, in order to give full faith and credit to the judicial proceedings of Iowa, to sanction such a proceeding. We think not. The section of the federal constitution referred to requires not only that full faith and credit shall be given to the judicial proceedings of another state, but also that full faith and credit shall be given to the public acts of such state. The laws of Nebraska make sixty days' wages of laborers, mechanics, and clerks, who are heads of families, exempt from attachment, execution, and garnishment proceedings. Where the wages are earned in Nebraska, and are there payable to the laborer residing ⁶⁸⁷ there, Nebraska is the *situs* of the debt: *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 175; 56 Am. Rep. 747; *Mason v. Beebee*, 44 Fed. Rep. 556. As pointed out in the case of *Mason v. Beebee*, 44 Fed. Rep. 556, there is a marked distinction between the *situs* of a chose in action for the purpose of jurisdiction and its *situs* for determining the rights of the parties thereto. The case of *Mason v. Beebee*, 44 Fed. Rep. 556, contains a well-reasoned discussion of the whole subject

by Judge Shiras. The opinion is too long to quote entire, and the whole of it is so closely applicable to the case at bar that we could not select one portion as more proper for quotation than the rest. Suffice it to say that the case of *Mooney v. Union Pac. Ry. Co.*, 60 Iowa, 346, is there discussed *in extenso*, its fallacies laid bare, and the monstrous injustice and disregard of the laws of other states which would result from following the *Mooney* case are there demonstrated. If the *situs* of the debt was Nebraska and not Iowa, then it follows that no legislative or judicial interposition in Iowa could rightfully sustain the jurisdiction of Iowa courts in such a case. If the courts of Iowa should seek to prosecute a citizen of Nebraska who does not come within their jurisdiction, and to reach over into Nebraska and take from this state the property of that citizen here located, can any one for a moment urge or seriously consider that our legislature and courts, in order to give full faith and credit to the judicial proceedings of Iowa, must stand idly by and countenance such a proceeding? Must we permit our laws to be nullified and evaded in order to sustain the courts of another state in overreaching their jurisdiction, in refusing to exercise the comity elsewhere accorded sister states and in seizing the property in Nebraska of citizens of Nebraska who have not brought themselves within the lawful reach of Iowa courts? To quote from the brief of the plaintiff in error a citation from Black on Constitutional Prohibitions: "The moment a state attempts to lay its hands upon the rights of those whose domiciles and affairs are beyond its ~~own~~ boundaries its acts are null." And to quote again from that brief: "Where, at the place of commission, the act is legally innocent it cannot be elsewhere made a delict,"—a principle which, if correct, must give rise to another principle, that where, at the place of commission, the act is legally wrong it cannot be elsewhere made right. The decisions of the supreme court of the United States in nowise militate against this view. In *Green v. Van Buskirk*, 5 Wall. 310, and 7 Wall. 139, the decision, so far as it is applicable to this case, we think directly tends to support our view. In that case one Bates, a citizen of New York, owned certain iron safes in Chicago upon which he gave a mortgage to Van Buskirk and others, which was executed and delivered in New York. The laws of Illinois required, for the validity of a chattel mortgage as against third persons, that it should be recorded and the property delivered to the mort-

gagee. These conditions were not complied with. The laws of Illinois further permitted attachments against a nonresident debtor. A creditor of Bates sued by attachment in Illinois, and levied upon and sold the safes. Van Buskirk then sued this creditor in New York state, and the creditor pleaded in bar the attachment proceedings in Illinois. The New York courts held that the transaction was governed by the laws of New York, and the case was then taken by writ of error to the supreme court of the United States, which held that the attaching creditor had been denied a privilege accorded him by the constitution of the United States, that the property, to wit, the safes, were situated in Illinois, and that the Illinois law must govern them. That is precisely the position of the defendant in error here. His property which was seized was in Nebraska, and subject to the jurisdiction of our courts and not those of Iowa.

In *Cole v. Cunningham*, 133 U. S. 107, it was held that it was not in violation of the constitution of the United States for a court in one state, in which proceedings have ⁶⁸⁹ been begun to distribute the estate of an insolvent debtor among his creditors, to enjoin a creditor of the insolvent, a citizen of the same state, from proceeding to judgment and execution in a suit against the insolvent in another state by an attachment of his property, which property the insolvent law of the state of the domicile of the parties required the debtor to convey to his assignee. It is true that in *Cole v. Cunningham*, 133 U. S. 107, there was a strong dissenting opinion by Mr. Justice Miller, concurred in by Justices Field and Harlan; but the dissent there was upon the ground that the opinion of the majority was contrary to *Green v. Van Buskirk*, 5 Wall. 310, 7 Wall. 139, the *situs* of the debt in *Cole v. Cunningham*, 133 U. S. 107, which it was sought to reach by attachment, being in the state where the attachment was levied, and not in the state of the residence of the parties where the injunction was granted; so that, taking either the majority opinion or the dissenting opinion in *Cole v. Cunningham*, 133 U. S. 107, we think that the case lends force to the views we have expressed.

Even the courts of Iowa have refused to apply to their own citizens the rules which they seek to enforce extra-territorially against the citizens of other states, and have restrained a citizen of Iowa from prosecuting a suit by attachment in Minnesota against another citizen of Iowa by

garnishment reaching a debt due for wages earned in Iowa: *Teager v. Landsley*, 69 Iowa, 725. As said by Judge Shiras in *Mason v. Beebe*, 44 Fed. Rep. 556: "Is it consistent for the courts of Iowa to forbid by injunction its own citizens from suing in Illinois for the purpose of evading the exemption laws of Iowa, and at the same time entertain suits by citizens of Illinois brought here for the purpose of evading the exemption laws of Illinois"? If full faith and credit have in these proceedings not been given to the public acts, records, and judicial proceedings of another state it is certainly not the legislature or courts of Nebraska which have been in fault.

••• The conclusion reached does not conflict with the decision in *Chicago etc. R. R. Co. v. Moore*, 31 Neb. 629, 28 Am. St. Rep. 534. It was there held that earnings so seized in Iowa could not be recovered from the garnishee, the Iowa courts having acquired jurisdiction so far as to require the garnishee to pay the money, and the judgment binding the parties to that extent. It is for that reason that a cause of action arose against the creditor for wrongful proceedings in evasion of our exemption laws.

3. Finally, it is urged that, if the law be constitutional, it cannot be made to apply to foreign corporations. It is stipulated in the bill of exceptions that the Singer Sewing Machine Company was and has continued doing business in Nebraska. It is stipulated that the debt out of which the controversy arose was contracted in Nebraska. As said by this court in *Turner v. Sioux City etc. R. R. Co.*, 19 Neb. 241: "There is great force in the argument that the exemption existing where a debt is contracted is a vested right *in rem*, which follows the debt into any jurisdiction in which an action may be brought; that is, that the law in force when and where a debt was contracted should govern as to the rights of the creditor and debtor in that case": See on this subject *Dorrington v. Myers*, 11 Neb. 388; *De Witt v. Wheeler & Wilson Sewing Machine Co.*, 17 Neb. 533. It is only upon a principle of comity that a foreign corporation is permitted to here do business. When it does come here and do business it does so with reference to our laws. It claims the rights and privileges of our laws, and it cannot evade their obligations. It would be monstrous to permit a foreign corporation to hold property here, to conduct business here, to enforce contractual rights obtained

under our laws, and at the same time to avoid the contractual obligations imposed by the same laws. But it is said that the judgment complained of grew out of an act committed elsewhere and innocent where it was committed. The general principle is conceded that the law of the place ⁶⁹¹ where an act is done determines its validity; but the tort complained of was not committed in Iowa. The tort consisted in seizing property in Nebraska exempt under the laws of Nebraska. The plaintiff in error was enabled to do this by instituting proceedings in another state; but the tort consisted not in instituting those proceedings in Iowa. A suit might rightfully be begun there *in personam* had Fleming brought himself within the jurisdiction of the Iowa courts. No action would have arisen had the property attached been situated in Iowa or in a state other than Nebraska. The wrong was in seizing the debt situated in Nebraska, payable in Nebraska to a citizen of Nebraska. The statute in this respect is not confined to actions begun in another state, but extends to every attachment or garnishment of exempt wages whether the proceeding be instituted in this state or elsewhere. It is true that, if the proceeding had been instituted in Nebraska, a partial redress could have been had by way of defense in the original action, but that consideration only affects the *quantum* of damages. The tort, the cause of action, would have been precisely the same. There is no question raised as to the jurisdiction of the court over the person of the plaintiff in error. It has committed an act here which is a tort, and it must here answer for that tort. A somewhat similar question was presented in the case of *O'Connor v. Walter*, 37 Neb. 267; 40 Am. St. Rep. 486. It was there said: "In extending credit, every one dealing with the head of a family must take into account this right of exemption, and presumably, in every extension of credit, this right is recognized. It therefore in no way operates to the injury of the law-abiding creditor. The rapacity which respects neither implied contract obligations nor statutory enactments must, in damages, respond for this, as for any other act of misappropriation."

We neglected, perhaps, in the proper place to notice one objection to the act, but it is one which can be appropriately ⁶⁹² noticed in closing—that is, that the act is "a vicious example of class legislation"; and *Atchison etc. Ry. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356, is cited in support of that proposi-

tion. The act under discussion in that case applied to one class only, and there was perhaps no basis founded upon any reasonable distinction for selecting that class as the recipients of that peculiar privilege. Here the case is different. The act we are now considering applies to every one who falls within the purview of the law exempting wages. The validity of that exemption cannot be doubted; and if it were proper for the legislature to provide that exemption, then it certainly was also proper for the legislature, by appropriate action, to enforce the rights so granted. The mischief, to prevent which the act was passed, is a matter of common knowledge. An extensive and thriving business was being conducted by the institution of suits precisely similar to that out of which this action arose, and having for their sole object the evasion of the laws of this state. The act was passed to prevent, and should be so construed as to prevent, the continuance of this infamous business. It is perhaps only fair to say that neither the representatives of the corporation in Nebraska nor counsel for the corporation engaged in this case are shown to have had any part in the Iowa proceedings.

Judgment affirmed.

GARNISHMENT — WAGES — EXEMPTIONS — JURISDICTION — CONFLICT OF LAWS.—Garnishment in one state of debt exempt in another: See *Drake v. Lake Shore etc. Ry. Co.*, 69 Mich. 168; 13 Am. St. Rep. 382; *Carson v. Railway Co.*, 88 Tenn. 846; 17 Am. St. Rep. 921; *Harwell v. Sharp Brothers*, 85 Ga. 124; 21 Am. St. Rep. 149, and note; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448; *Illinois Cent. R. R. Co. v. Smith*, 70 Miss. 344; 35 Am. St. Rep. 651, and note; *O'Connor v. Walter*, 37 Neb. 267; 40 Am. St. Rep. 486, and note; *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849; 40 Am. St. Rep. 522.

SITUS OF DEBT FOR PURPOSE OF GARNISHMENT: *Illinois Cent. R. R. Co. v. Smith*, 70 Miss. 344; 35 Am. St. Rep. 651, and note.

CONFLICT OF LAWS.—Enforcement of laws of another state will be permitted in this state, when: See note to *Alabama etc. R. R. Co. v. Carroll*, 38 Am. St. Rep. 178.

CONSTITUTIONAL LAW—STATUTE INVALID IN PART.—The unconstitutionality of one portion of a statute cannot defeat other portions, unless the nature of the unconstitutional provision is such as to render it of vital importance to the whole statute: *McPherson v. Blacker*, 92 Mich. 377; 31 Am. St. Rep. 587.

PLEASANTS v. BLODGETT.

[39 NEBRASKA, 741.]

VENDOR AND PURCHASER—NOTICE OF OCCUPANT'S RIGHTS.—A purchaser of real property in the actual possession and occupancy of another is charged with notice of any right, title, or interest which the occupant has in such property.

VENDOR AND PURCHASER—QUITCLAIM DEED.—A purchaser of real estate, under a quitclaim deed, acquires only the interest the grantor has in the property at the time of the conveyance. If the grantor has no interest, none is conveyed by such a deed.

VENDOR AND PURCHASER—RECORD OF MORTGAGE AS NOTICE—PRESUMPTION.—The existence of record of a mortgage on real estate is of itself sufficient to put an intending purchaser of the property on inquiry as to the interest of the mortgagor in such real estate. The presumption is that the mortgagor is the owner of the property mortgaged.

VENDOR AND PURCHASER—QUITCLAIM DEED—BONA FIDE PURCHASER—WHO IS NOT.—One who buys real estate under a quitclaim deed from his immediate grantor is not a *bona fide* purchaser as to outstanding and adverse equities and interests against his grantor shown by the record, or which may be discovered by exercising reasonable diligence or making proper examination and inquiry.

ACTION TO QUIET TITLE—LIMITATION OF ACTION.—The statute of limitations does not begin to run in favor of the defendant, in an action to quiet title, until he asserts title or ownership to the property in controversy.

VENDOR AND PURCHASER—STATUTE OF FRAUDS.—If the question at issue is one of equities between two parties holding deeds for the same property from the same grantor the statute of frauds is inapplicable.

ACTION by Pleasants to quiet title. There was a judgment for the plaintiff, which was affirmed on the former appeal. The facts are stated in the opinion.

H. H. Blodgett, for the appellants.

Charles O. Whedon and Charles L. Hall, for the appellees.

741 RAGAN, C. This is a rehearing of *Pleasants v. Blodgett*, 82 Neb. 427. The opinion there reported contains a sufficient 742 statement of the facts in the case. Counsel for appellants on the rehearing contends:

1. That they are *bona fide* purchasers for value without notice of Pleasants' title, and strenuously insists that the district court had not before it evidence to support its finding that appellants were not *bona fide* purchasers, and that this court was entirely wrong in affirming the decree of the district court. This contention of appellants has led us to a re-examination of the entire evidence in the record. This record contains evidence showing that on the 3d of Feb-

ruary, 1874, Pleasants bought the property in controversy from one Boyd, and paid for it by assigning to Boyd a judgment, and for the balance of the purchase price gave his note to Boyd, secured by a mortgage on the property; that this mortgage was at once recorded; that at this time the property was a vacant lot without any improvements; that Boyd promised Pleasants to execute a deed and leave it with one Scott for Pleasants, and afterward told him he had done so; Scott does not remember whether the deed was left with him or not, but says it might have been; that some of his papers were destroyed by fire; that Pleasants, in 1885, paid off the mortgage he had given Boyd, and in April, 1886, paid up the taxes and took actual possession of this lot, until then vacant and unoccupied; that Boyd left the state about 1875, having sold the Pleasants note and mortgage; that in 1887 Blodgett was advised that in 1874 he had sold the property to Pleasants, and taken a mortgage from Pleasants; thereupon Boyd executed a second deed for the property to Pleasants; that appellant Blodgett claims title to this lot by virtue of a quitclaim deed from Boyd, dated August 6, 1875, and recorded by Mr. Blodgett eleven years and three days later; that Mr. Blodgett took no possession of this lot; that he exercised no act of ownership over it; that his first assertion of ownership of the property was the filing of his deed; that he never paid any taxes on the lot; that he was present when Pleasants bought ⁷⁴³ the lot of Boyd; that the transaction—that is, the purchase of the lot and the giving of the mortgage—occurred in Mr. Blodgett's office. Boyd, by his deed to Blodgett, expressly quitclaimed such interest as he, Boyd, had in the property. Boyd at that time had no interest in the property, and hence conveyed none: *Hoyt v. Schuyler*, 19 Neb. 657; *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243. We cannot say from this evidence that the district court erred in finding that Mr. Blodgett was not an innocent purchaser of this property.

2. So far as appellants, the Ritcheys, are concerned, they claim to have purchased this property from Mr. Blodgett, taking from him a quitclaim deed and giving him back a mortgage to secure the entire purchase money. At the time they took their quitclaim deed Pleasants was in the actual and open possession of this lot. His possession was notice to all the world of his rights and interest in the property: *Uhl v. May*, 5 Neb. 157; *Scharman v. Scharman*, 38 Neb. 39.

3. The next complaint of appellants is that to Pleasants' action to quiet title to this lot they set up as a defense that "Boyd and Pleasants confederated together to make a security and sale of the mortgage," and for this purpose Pleasants gave his note without consideration to Boyd for twenty-five dollars, secured by a mortgage on this property. This note Boyd was to pay, and as a matter of fact Pleasants never bought the lot, and that the district court, and this court as well, wrongfully refused under the evidence to so find. This was a good defense, if proved, but, in our humble opinion, the finding of the district court adversely to the contention of appellants as to this defense is supported by the evidence. The fact that there was of record a mortgage from Pleasants to Boyd on this property was sufficient of itself to warn a prudent intending purchaser thereof that Pleasants probably claimed some interest in the property. When one makes a mortgage on real estate to another the presumption, at least, is that the mortgagor is the owner of the property mortgaged.

⁷⁴⁴ 4. The fourth complaint of appellants is that the district court in its former opinion disregarded the plea of the statute of limitations set up by appellants to appellee's action. Counsel seems to overlook the fact that this is an action brought by appellee to quiet his title; and we are not aware of any rule of law that requires the owner of real estate to bring such an action until some one in some manner sets up or asserts some title or claim against the property, the title of which is sought to be quieted. So far as the evidence in the record shows, the first assertion of title or ownership to the property in controversy ever made by any of the appellants was made by appellant, Mr. Blodgett, when he filed his quitclaim deed in August, 1886. If the statute of limitations is a defense to such an action as this, then the statute did not begin to run until the filing of the quitclaim deed, and was not a bar at the time this suit was begun.

5. The final contention of the appellants is that both the district court and this court ignored the statute of frauds pleaded by the defendants as a defense to the action of Pleasants. It seems to be the opinion of the learned counsel for appellants that because a deed was not made and delivered by Boyd to Pleasants at the time of his purchase of the lot Pleasants cannot be heard to claim title to this lot, and his

only remedy is to sue Boyd for the purchase money. But this is not an action by Boyd against Pleasants to compel him to convey the real estate mentioned. The question here is one of equities between two parties holding deeds for the same property from the same grantor, and we confess our inability to see that the statute of frauds is applicable. It may be that this inability on our part is unpardonable, but the fact remains that we are unable to comprehend that which to the learned counsel seems so lucid. The former opinion of this court is adhered to.

Affirmed.

Post, J., not sitting.

VENDOR AND PURCHASER—NOTICE.—Purchase from one not in possession is chargeable with what notice and duty: *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295; *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285.

A PURCHASER BY QUITCLAIM DEED TAKES ONLY what the vendor could lawfully convey: *San Francisco v. Lawton*, 18 Cal. 465; 79 Am. Dec. 187; note to *Adams v. Cuddy*, 25 Am. Dec. 334; *Snyder v. Laframboise*, Breese, 343; 12 Am. Dec. 187.

NOTICE MUST BE TAKEN OF MORTGAGES AND OTHER MATTERS OF RECORD: *Ahern v. Freeman*, 46 Minn. 156; 24 Am. St. Rep. 206; *Stewart v. Matheny*, 66 Miss. 21; 14 Am. St. Rep. 538, and notes; *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826, and note 829; *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295.

VENDOR AND PURCHASER—NOTICE.—Whatever will put a purchaser on inquiry and lead to knowledge is notice: See cases cited in note to *Murrell v. Mandelbaum*, 34 Am. St. Rep. 783; *Clark v. Holland*, 72 Iowa, 34; 2 Am. St. Rep. 230; *Knapp v. Bailey*, 79 Me. 195; 1 Am. St. Rep. 295.

VENDOR AND PURCHASER.—PURCHASER BY QUITCLAIM is not a *bona fide* purchaser without notice: See note to *Thorn v. Newsom*, 53 Am. Rep. 751.

CLOUD ON TITLE NOT WITHIN GENERAL STATUTE OF LIMITATIONS: See note to *Wagner v. Law*, 28 Am. St. Rep. 72.

MYERS v. MCGAVOCK.

[89 NEBRASKA, 842.]

GUARDIAN AND WARD—POWER OF NATURAL GUARDIAN—JURISDICTION.—

In the absence of a statute conferring authority on a natural guardian, as such, to dispose of the real estate of his wards, a court has no power to authorize him, as such, to sell the property of his wards. The statute of Nebraska does not empower him to do so.

GUARDIAN AND WARD—AUTHORITY OF LEGAL GUARDIAN AS TO SALE—

POWER OF COURT.—The authority of a guardian to sell the real estate of his wards for any purpose must be found in the statute; and, if the statute confers no such authority upon the natural guardian, the only

guardian a court has jurisdiction to license to make such a sale is one who has been appointed and commissioned by a court having authority to appoint guardians, and who has accepted such appointment and is qualified and acting.

GUARDIAN AND WARD.—A NATURAL GUARDIAN MAY BECOME THE LEGAL GUARDIAN of his wards, by appointment from the proper authority, acceptance of such appointment, and qualifying as such legal guardian.

GUARDIAN AND WARD—APPLICATION OF FOREIGN GUARDIAN FOR LICENSE TO SELL—JURISDICTION.—On the application of a foreign guardian to the district court of Nebraska for a license to sell the real estate of his wards, situated in that state, the fact that the guardian's appointment was made in the state of Iowa, if the wards were residing there at the time of such appointment, and that the wards had afterward removed to the state of Illinois, and were residing there at the time of the application in Nebraska to sell, does not deprive him of control over them, or their property, or the court of Nebraska of jurisdiction to grant the license.

GUARDIAN AND WARD—EVIDENCE—CONCLUSIVENESS OF FINDING AS TO GUARDIAN'S APPOINTMENT.—On the application of a foreign guardian for leave to sell the real estate of his wards the question as to whether the certified copy of the guardian's appointment is the best evidence, or competent evidence, is one for the court hearing the application, and it is for that court to say whether it is satisfied with the evidence offered to prove that the guardian is the regularly appointed, qualified, and acting guardian of the heirs whose real estate he is making application to sell. Its finding in the matter is conclusive until reversed on appeal.

FINDING AND JUDGMENT—COLLATERAL ATTACK.—The finding and judgment of a court cannot be successfully assailed as void, in a collateral proceeding, on the ground that the court made such finding or rendered such judgment on incompetent evidence.

GUARDIAN AND WARD—VERIFICATION OF PETITION FOR LICENSE TO SELL.—On the petition of a guardian for a license to sell the real estate of his wards, his failure to verify it does not affect the jurisdiction of the court or render its proceedings void, especially if it has been verified by the guardian's attorney who conducts the proceedings.

GUARDIAN AND WARD.—AN APPLICATION BY A GUARDIAN FOR A LICENSE TO SELL THE REAL ESTATE of his wards for their maintenance and education is a proceeding *in rem*, a proceeding on behalf of the wards, and not adversary to them. Hence, notice to them of such application is not essential to the jurisdiction of the court to grant the license, though it might be otherwise with an application to sell for the purposes of paying debts.

APPEAL—FINDING—GUARDIAN AND WARD—CONFIRMATION OF SALE.—If the court, in its order confirming a guardian's sale of the real estate of his wards, makes a finding that the proceedings of the guardian in making the sale are, in all respects, regular, and in conformity with law, it will be presumed, nothing to the contrary appearing in the record, that there was evidence to justify the finding.

GUARDIAN AND WARD.—IT IS THE DUTY OF COURTS HAVING AUTHORITY TO APPOINT GUARDIANS to see that they are capable and honest, that they give and keep good the bonds required for the faithful execution of their trust, and that they render, at frequent intervals, accounts of their guardianship.

ADOPTED STATUTES—RULE AS TO CONSTRUCTION OF.—The rule that, when one state adopts the statute of another, it thereby adopts the construction placed on such statute by the highest court of the state from which it is taken has no application when such construction is not placed on the statute until after its adoption.

GUARDIAN AND WARD—SALE—DUTY OF COURT.—The court should not authorize a guardian to sell the real estate of his wards for their maintenance and education until it has investigated and inquired into all the facts, and is satisfied that such sale is a necessity, or is for the best interests of the wards.

GUARDIAN AND WARD—PETITION FOR SALE—STATUTE INAPPLICABLE—NOTICE.—The provisions of section 109, chapter 23, of the Compiled Statutes of Nebraska of 1893 are not applicable to a proceeding instituted by a guardian of minors for a license to sell their real estate for their education and maintenance. Hence, it is not necessary, in such a proceeding, to serve notice of the application to sell upon the heirs presumptive of the wards.

GUARDIAN AND WARD—BOND ON APPLICATION FOR LICENSE TO SELL—COLLATERAL ATTACK.—In a collateral proceeding a guardian's deed will not be declared void on the ground that the bond filed by the guardian for the purpose of obtaining the license to sell the real estate of his wards was not formally approved.

GUARDIAN AND WARD—NOTICE OF SALE—APPEAL, FINDING, AND PRESUMPTION.—After proper posting of notices of a guardian's sale, and a finding by the court that the sale was regular and in conformity with law, it will be presumed, upon a collateral attack, that sufficient evidence was offered to the court, when the sale came on for confirmation, that the notices thereof had been posted as the statute required, and the guardian reported, although no copy of the posted notices was found in the record of the proceedings.

GUARDIAN AND WARD.—A guardian's sale of the real estate of his wards, not made by the guardian personally, but through his attorney who conducted the proceedings in court, is not for that reason void.

GUARDIAN AND WARD—SUFFICIENCY OF DESCRIPTION AS TO PROPERTY SOLD.—Property sold and conveyed by a guardian was described as "the N. E. two-thirds ($\frac{2}{3}$) of lot eight (8) in block two hundred and three (203) of the city of Omaha, being all that portion of said lot eight (8) not belonging to the Union Pacific Railway Company." This description, while not very definite, was held not void for uncertainty, but sufficient to identify the property.

EJECTMENT—EVIDENCE.—If, in an ejectment suit, the defendant claims title by virtue of a guardian's sale and conveyance, the fact that the required bond in the guardianship proceeding was approved by the judge of the court granting the guardian a license to sell may, like any other fact, be proved by the best evidence attainable.

GUARDIAN AND WARD—PETITION FOR LICENSE TO SELL—ADULT'S INTEREST NOT DIVESTED BY APPEARANCE—SALE AND CONVEYANCE—OUSTER AS TO ADULT'S INTEREST—ADVERSE POSSESSION—LIMITATIONS OF ACTIONS.—Upon an application by the guardian of minors to sell their real estate, if the mother and an adult brother of such minors enter their appearance and consent that the license to make the sale may be granted, the interest of said widow and adult son in said real estate will not therefore be divested by a sale and conveyance by virtue of

such proceedings; but if the proceedings purport to dispose of the interest of the adult parties, and the purchaser enters into exclusive possession, such proceedings and entry will operate as an ouster of such adults, the possession becomes adverse, and, if continued for the statutory period, will divest the title of the adults.

ADVERSE POSSESSION—TITLE ACQUIRED BY.—One who has been in the open, notorious, exclusive, and adverse possession of real estate for ten years becomes vested with a valid title to the same.

RAILROAD COMPANIES—POWER OF, TO ACQUIRE TITLE TO REAL ESTATE.—Under the constitution of Nebraska, a railway corporation chartered by an act of Congress is incompetent to take title to real estate until it shall have become a body corporate under the laws of that state; but a conveyance of real estate to such a corporation is not therefore void; it is only voidable, and the title is valid against every one but the state, and can be divested only in proceedings brought by the state for that purpose.

RAILROAD COMPANIES—MAY ACQUIRE TITLE TO REAL ESTATE BY ADVERSE POSSESSION.—Though a railroad corporation chartered by act of Congress is incompetent to take title to real estate in Nebraska until it shall have become a body corporate under the laws of that state, yet it may acquire such a title to real property in that state, by open, notorious, exclusive, and adverse possession thereof, under a claim of title for ten years, as will be valid against all persons except the state.

LIMITATIONS OF ACTIONS—NOT STAYED BY CONVEYANCE TO ONE INCOMPETENT TO TAKE TITLE.—The statute of limitations having begun to run against the owners of real property in the adverse possession of another, a conveyance and delivery of possession of such property by the adverse occupant, to one incompetent to take the title, does not arrest the running of the statute against such owners.

RAILROAD COMPANIES—FOREIGN CORPORATION—EMINENT DOMAIN—SETTLEMENT WITH GUARDIAN.—Unless prohibited by statute, a foreign railroad corporation may, like a domestic corporation, make a settlement with the guardian of minors, whose estate it takes under the right of eminent domain, for depot purposes, and such settlement, and a release and discharge by the guardian in pursuance thereof, will vest in the corporation a perpetual easement in the property.

RAILROAD COMPANIES—STATUTES—EMINENT DOMAIN—SETTLEMENT WITH GUARDIAN.—The provisions of chapter 16 of the Compiled Statutes of Nebraska of 1893, concerning the power of railroad companies to take land under the right of eminent domain, and to make a settlement with, and to take a release and discharge from, legal guardians, apply to all corporations operating roads in the state, whether domestic or foreign.

Guy R. C. Read and William D. Beckett, for the appellants.

Francis A. Brogan, for the appellee McGavock.

John M. Thurston and W. R. Kelly, for the appellee The Union Pacific Railway Company.

Montgomery, Charlton & Hall, for the appellees Hobbie.

854 RAGAN, C. This is a suit in ejectment brought by Susan B. Myers, Sarah E. Myers, Luella G. Myers, Fannie

B. Myers, and Stephen B. Myers against Alexander McGavock and wife, Henry C. Hobbie, and C. E. Hobbie, his wife, Helen C. Hobbie and her husband, and the Union Pacific Railway Company to recover possession of an undivided three-fourths interest in and to lot 8, block 203, in the city of Omaha. At the close of the evidence the jury, in obedience to an instruction of the court to that effect, returned a verdict in favor of the defendants. The court having refused to set this aside, and having rendered judgment thereon, the plaintiffs below bring the case here on error. All parties claim title under one Henry B. Myers, who died seised of the premises June 14, 1864. The plaintiffs in error claim as his widow and heirs. The defendant in error, Alexander McGavock, claims a portion of the premises by virtue of a sale and conveyance thereof to him, made by the guardian of the minor heirs of Henry B. Myers. The Hobbies hold under a conveyance from McGavock, and their claim will not be further noticed. The Union Pacific Railway Company holds possession of a portion of the lot occupied by it by virtue of a conveyance from McGavock, and holds possession of the remainder of such portion of said lot as it occupied by virtue of an appropriation thereof for railroad purposes on May 15, 1871, and a settlement then made with the guardian of the minor heirs of said Henry B. Myers for all damages accruing to said minors by reason of said appropriation of said portion of said lot.

§55 We will first dispose of the case so far as the defendant in error, Alexander McGavock, is concerned. The point relied upon by the able and industrious counsel for plaintiffs in error to defeat McGavock's title is, that the guardian's deed, by virtue of which he claims, and the proceedings and sale on which said deed is based, were and are void. Philip Myers, on the 8th of November, 1864, was, by the county court of Mahaska county, Iowa, appointed guardian for the minor children of Henry B. Myers, deceased, who, it appears, died intestate, shortly before that time in said county. Philip Myers accepted said appointment, and duly qualified as such guardian. On the thirteenth day of June, 1874, he filed a petition in the district court of Douglas county, setting forth his appointment as guardian; the names and ages of his wards; that as heirs of Henry B. Myers, deceased, they were owners of the real estate in controversy here; that it was necessary for the support, care, maintenance, and education of his

wards that said real estate should be sold, and prayed said district court for a license for such purpose. In accordance with the prayer of the petition of said guardian, the district court of Douglas county made an order authorizing the guardian to sell the real estate of his said wards; and that portion of said lot not theretofore appropriated as hereinbefore stated by the Union Pacific Railway Company was sold by the defendant in error, Alexander McGavock. The district court of Douglas county confirmed this sale, and, in pursuance thereof, and the order of the court, the guardian executed to the defendant in error, Alexander McGavock, the deed under which he claims title. The plaintiffs in error allege that this deed is void for the following reasons:

1. That the guardian making the sale was not the guardian of the persons of said minors, but only of their property in the state of Iowa, and he was not authorized to make the application to sell their property in this state. The contention of the counsel is that since the minors had ^{§58} a guardian of their property and a guardian of their persons, the district court had jurisdiction to grant the license for the sale of their property to the guardian of their persons only. The minor children of Henry B. Myers had two guardians—their mother, Susan B. Myers, who was their guardian by nature, or natural guardian, and Philip Myers, who was their legal guardian; and, if counsel are correct, then the only person the district court of Douglas county had jurisdiction to authorize to sell the property of these minor children was their mother. Section 58 of chapter 23 of the Compiled Statutes of 1893 provides: "When any minor, residing without this state, shall be put under guardianship in the territory or country in which he resides, the foreign guardian may file an authenticated copy of his appointment in the district court in any county in which there may be any real estate of the ward," etc. And section 59 of said chapter provides: "After filing such authenticated copy of his appointment such foreign guardian may be licensed by the district court of the same county to sell the real estate of the ward of this state," etc. We are of opinion that the district court of Douglas county had no jurisdiction to grant the license to the natural guardian, as such, of the minor children of Henry B. Myers for the sale of their real estate. The authority of a guardian to sell the real estate of his wards for any purpose must be found in the statute; and our laws con-

fer no authority on a natural guardian, as such, to dispose of the real estate of his ward, and no district court has jurisdiction to authorize a natural guardian, as such, to sell the real estate of his ward. The only kind of a guardian the district court has jurisdiction to authorize to sell the property of his ward is a guardian appointed and commissioned by a court having jurisdiction to appoint guardians; and, to confer jurisdiction on a district court of this state to authorize a guardian to sell the property of his ward, it must appear that such guardian ^{§57} had accepted such appointment and qualified, and was acting as such guardian. The natural guardian may become the legal guardian of his ward, but, in order to become such legal guardian, he must be appointed such by the proper authority, accept such appointment, and qualify as such legal guardian: *Shanks v. Seamonds*, 24 Iowa, 131; 92 Am. Dec. 465. As it appears that Philip Myers, at the time he made application to the district court of Douglas county for license to sell the property of his wards, was the duly appointed, qualified, and acting guardian of the minor children of Henry B. Myers, deceased, and such facts appeared in the petition filed by him for such license, on the face of the petition the district court had jurisdiction to grant him the license prayed for, and he was the proper party, and the only proper party, so far as the record discloses, to make such application.

2. That such guardian was not appointed in the state where the wards then resided. The evidence in the record does not sustain this point. In the petition filed in the district court for the license to sell it is stated that the wards were at that time residing in the state of Illinois; but it appears from the evidence that Henry B. Myers died at his residence in Mahaska county, Iowa. His widow petitioned the county court of that county to appoint Philip Myers guardian of her minor children. His estate was administered there, and he had there a homestead. These facts raise the presumption that at the time Philip Myers was appointed guardian his wards were residing in the county in which he was appointed, and, since there is no evidence in the record to the contrary, that fact must stand as established. It remains to be said of this point, however, that it would seem to be one which goes to the jurisdiction of the court that appointed the guardian, rather than to the district court granting the license to sell. The fact that the wards of Philip Myers were resid-

ing in the state of Illinois at the time he made application to the Nebraska ^{§58} court for license to sell their real estate did not deprive him of control over them or their property, nor the latter court of jurisdiction to grant the license.

3. That Philip Myers did not file in the district court of Douglas county an authenticated copy of his appointment as guardian. As already stated, Philip Myers was appointed guardian by the county court of Mahaska county, Iowa. This was done on the 8th of November, 1864. The application to sell the real estate of his wards was made to the district court of Douglas county in June, 1874. The guardian at that time filed in that court a copy of his said appointment as guardian by the Iowa court. This copy is certified to by the clerk and under the seal of the circuit court of said Mahaska county; and the contention here is that the district court of Douglas county was without jurisdiction to license this sale, because the copy of the letters of guardianship was not such an authenticated copy of the guardian's appointment as is required by sections 58 and 59, quoted above. While it appears that the guardian received his appointment from the county court of Mahaska county, Iowa, the certificate of the clerk of the circuit court of said county attached to the letters of guardianship recites that said circuit court at that time had jurisdiction in probate matters; and that the copy of the letters of guardianship, to which the certificate is attached, is full, true, and complete, and that the original remains on file in the office of such clerk. It is argued that this certified copy of the guardian's appointment was incompetent evidence under section 414 of the Code of Civil Procedure, which provides that a judicial record of another state may be proved by the attestation of the clerk and the seal of the court, together with a certificate of a judge or presiding magistrate that the attestation is in due form of law. Whether this certified copy of the guardian's appointment was the best evidence, or competent evidence, was a question for the district court hearing the application for license to sell, in ^{§59} which proceeding the evidence was offered. It was for that court to say whether it was satisfied with the evidence offered to prove that Philip Myers was the then appointed, acting, and qualified guardian of the minor heirs of Henry B. Myers, deceased. That court accepted the testimony as sufficient to prove that fact, and its finding is conclusive unless appealed from: *Menage v. Jones*, 40 Minn. 254. The

finding and judgment of a court cannot be successfully assailed as void, in a collateral proceeding, because such court made such finding or rendered such judgment on incompetent evidence.

4. That the petition for license to sell the real estate was not verified by the guardian. The petition was verified by an attorney of the Douglas county bar, being the attorney and counsel who conducted the proceedings for the guardian. The failure of the guardian to verify his petition did not affect the jurisdiction of the district court of Douglas county, nor render its proceedings void: *Hamiel v. Donnelly*, 75 Iowa, 93; *Ellsworth v. Hall*, 48 Mich. 407; *Trumble v. Williams*, 18 Neb. 144.

5. That no notice, either actual or constructive, of the application to sell was given to the wards. Section 49 of said chapter 23 provides: "A copy of such order [to show cause why the license prayed for should not be granted] shall be personally served on the next of kin of such ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or shall be published at least three successive weeks in such newspaper circulating in the county as the court shall specify in the order." The next of kin of these wards were Stephen B. Myers, an adult brother, and Susan B. Myers, their mother. These two filed their consent in writing in the district court of Douglas county to the proceeding instituted by the guardian and in such proceeding. This complied with the statutes quoted above so far as the next of kin are concerned. If any one else than this adult brother and his ⁸⁶⁰ mother, other than the wards themselves, had any interest in the lot sought to be sold, the record makes no mention of it, nor is there any claim here that the guardian's deed is void because others than the wards interested in the real estate were not notified of the proceedings for its sale. So that we have this single question: In a proceeding by a guardian to sell his ward's real estate for the education and support of said ward, must notice of such application be served on said wards in order to give the district court jurisdiction of said proceeding? If such notice is required by the section of the statute above quoted, then the guardian's deed, under which McGavock claims, and all the proceedings leading up to and upon which it is based are void, for no such notice was given. Counsel for plaintiffs in error say "that the wards were persons interested in the real estate within

the meaning of said section 49; that the application to sell is a proceeding on its face prejudicial to the wards, because, if the application is successful, its effect is to turn the real estate into money, which may be squandered before they become of age, and that, therefore, notice of the application for license to sell should have been served on the wards." It is true the wards are persons interested in the estate; but that an application by their legally appointed, qualified, and acting guardian for a license to sell such wards' real estate for the purpose of maintaining and educating them is, on its face, a proceeding prejudicial to such wards, or one in its nature adversary to them, cannot, we think, be successfully maintained. Had this been an application to sell the real estate of these wards for the purpose of paying debts, then, it seems, counsel's construction of the statute would be correct, for such proceeding would in its nature be an adversary one to such wards, and a sale made of their real estate for such purpose without the statutory notice to them of the time and place of the hearing of the application therefor would be void: *Mickel v. Hicks*, 19 Kan. 578; 27 Am. Rep. 161. But the guardian's sale under consideration was not made to ~~see~~^{pay} debts. The petition filed for the license to sell the real estate in controversy here set forth facts, which, if true, showed that a sale of this real estate was for the advantage of these minors. The proceeding was instituted by their guardian for their benefit. It was on their application, in effect, that the license to sell their real estate was granted, and not in any proceeding against them. It is unfortunately true sometimes, through the lack of judgment or through the dishonesty of guardians or the failure to exercise vigilance on the part of courts, that minors are deprived of their property; but no legislature can enact a law, nor court lay down a rule of construction, that will always and in every case protect the orphan and secure him in his own. The statutes of the state require that courts having authority to appoint guardians shall see to it that the persons so appointed are capable and honest; that they give and keep good the bonds required by the statute for the faithful execution of their trust, and render to the court at frequent intervals accounts of their guardianship. On the district court judges the law has conferred the exclusive power to say whether the facts exist which justify a sale of a ward's property by his guardian; to say whether the sale is a necessity to which the

ward must submit; to say whether, in the judgment of the court, the sale asked to be authorized is for the best interests of the minor. This is a great discretion, and a sacred trust confided to district judges by the law, and they are thus made the guardians of the orphans of the commonwealth. Their authority to authorize a guardian, on his application, to sell his ward's real estate was not meant to be exercised as a matter of course, but only after inquiry and investigation into all the facts and circumstances; and not then unless the mind of the court is convinced that such sale is a necessity, or is for the best interests of the ward. We shall not attempt a citation of all the cases, nor indeed many of them, for and against the ⁸⁶² proposition that notice to a ward of the application of his guardian for license to sell his real estate for the maintenance and education of such ward is essential to the jurisdiction of the court to order the sale. The authorities are as conflicting as they are numerous; but we think that the weight of authority is that such proceeding is one *in rem*—a proceeding on behalf of the ward and not adversary to him—and that notice to such ward of such proceeding is not essential to the jurisdiction of the court to grant the license for the sales. In support of this view, see *Grignon v. Astor*, 2 How. 319; *Mohr v. Manierre*, 101 U. S. 417; *Thaw v. Ritchie*, 136 U. S. 519; *Scarf v. Aldrich*, 97 Cal. 360; 33 Am. St. Rep. 190; *Mohr v. Porter*, 51 Wis. 487, and authorities there collated. Opposed to this view are *Good v. Norley*, 28 Iowa, 188; *Washburn v. Carmichael*, 32 Iowa, 475; *Lyon v. Vanatta*, 35 Iowa, 521; *Rankin v. Miller*, 43 Iowa, 11. Indeed, it seems to be the settled rule of the supreme court of Iowa that in order to invest a court with jurisdiction to license a guardian to sell his ward's real estate that such ward must have notice of the application; and the rule has been consistently adhered to by that court. The rule in Mississippi appears to be the same as that in the state of Iowa: *Hamilton v. Lockhart*, 41 Miss. 460; *Rule v. Broach*, 58 Miss. 552.

Under a statute substantially like the one quoted above, and of which it is said that the Nebraska statute is a copy, the supreme court of Wisconsin at one time held that notice to the ward of an application by his guardian to sell his real estate was essential to confer jurisdiction on the court to grant the license: *Mohr v. Tulip*, 40 Wis. 66; but the case was overruled by that court in *Mohr v. Porter*, 51 Wis. 487.

The decisions of the supreme court of Illinois are not uniform as to the rule as to whether notice to the ward of the application to sell his real estate is jurisdictional. In *Mason v. Wait*, 4 Scam. 127, it was said that the ^{§63} proceeding by a guardian for a license to sell his real estate is not a proceeding adversary to the ward's interest, and that notice of such proceeding is not necessary to confer jurisdiction on the court to authorize the sale. This was in 1842. The same doctrine was announced by that court in *Mulford v. Beveridge*, 78 Ill. 455; but in 1877, in *Musgrave v. Conover*, 85 Ill. 374, that court held: "Where the record of a proceeding by a guardian for the sale of his ward's land fails to show any notice of the application to the wards, the decree purporting to authorize the sale will be void for want of jurisdiction, and may be attacked collaterally." Again, in 1887, in *Spring v. Kane*, 86 Ill. 580, that court said: "A proceeding by a guardian to sell his ward's land for his maintenance, being *in rem* and made on behalf of the owner, it is only necessary the court should have jurisdiction of the subject matter to make an order to sustain a sale made thereunder."

The cases cited from the state of Illinois serve to show the bewildering conflict in the authorities on the subject under consideration.

Counsel for plaintiffs in error insist, somewhat strenuously, that this court should follow the rule laid down by the supreme court of Wisconsin in *Mohr v. Tulip*, 40 Wis. 66, because they say that our statute was adopted from Wisconsin, and that in adopting the statute the legislature intended to adopt, and did adopt, the construction placed thereon by the supreme court of the state from which it was taken. We have already seen that the supreme court of Wisconsin has overruled *Mohr v. Tulip*, 40 Wis. 66; but there is still another thing in this connection. *Mohr v. Tulip*, 40 Wis. 66, was decided in 1876, while our statute, which is said to be a copy of the Wisconsin statute construed in that case, was enacted by our legislature in 1866, or about ten years before the supreme court of Wisconsin put a construction upon it. The point made by counsel then is not tenable. The rule that when one state adopts the statute of another, that ^{§64} it thereby adopts the construction placed on such statute by the highest court of the state from which it is taken, has no application when such construction is not placed on the statute until after its adoption.

6. That no notice of the application to sell was served upon the heirs presumptive of the wards. The ingenious argument of the able counsel is thus stated by them in their brief: "Now, in this case, Henry B. Myers, Susan B. Myers, and Sarah E. Myers were minor children, brother and sisters, and each one was the heir presumptive of the other. Each one was therefore entitled to notice of the application to sell the other's property. The fact that the guardian made one application to sell the property of all said minors does not alter the case. If he had made application to sell the property of Harry B. Myers alone he would have been obliged to notify Sarah E. and Susan B. Myers as heirs presumptive. The fact that he was seeking at the same time to sell their own property made his default greater instead of less. Now, even if the guardian does represent the ward for the purpose of selling his own property, he does not represent him for the purpose of waiving notice of the application to sell his brother's property. In this view of it, Susan B. Myers and Sarah E. Myers, plaintiffs in error, say: 'In 1874 application was made in the district court of Douglas county, Nebraska, to sell our brother's property. We were his sisters, his heirs presumptive, interested in his estate, and we were entitled to notice of that application to sell. We received no such notice, and we claim that the sale as to us is void. Our brother has since died, and we have succeeded by inheritance to his property.'" This argument of counsel is based on their construction of section 109 of said chapter 23. The section is as follows: "All those who are next of kin and heirs apparent or presumptive of the ward shall be considered as interested in the estate, and may appear and answer to the petition of the guardian, and, when personal ~~see~~ notice of the time and place of hearing the petition is required to be given, they shall be notified as persons interested according to the provisions respecting similar sales by executors and administrators contained in this subdivision." But the provisions of this section 109 are not applicable to a sale of the real estate of the ward by his guardian when such sale is made for the support and maintenance of the ward. The meaning of this section is that when any person other than the minor, such as an insane person, an idiot, a spendthrift, or a drunkard, shall be under guardianship, and an application shall be made by such person's conservator or guardian for license to sell his real estate, then the heirs

presumptive, that is, all such persons as would inherit such persons' property should he die immediately, shall be deemed interested in the estate, and notice of the application shall be served upon them.

7. That no bond was given by the guardian to the district judge and approved by him. A bond in proper form and with proper sureties was executed and filed in the court in the proceeding as required by the statute; but the record of the proceeding, in which the license to sell the real estate of the wards was granted, does not show that this bond was formally approved by the judge who granted the license. It is now claimed that this silence of the record is conclusive evidence that the bond was not approved by the judge, and his failure to formally approve the bond renders the entire proceeding void. On the trial of the case at bar the defendants proved by the attorney who conducted the proceeding on behalf of the guardian, that the bond was in fact presented to, and approved by, the presiding judge. The fact of the approval of the bond, like any other fact, might be proved by the best evidence attainable. We are of opinion, however, that in this collateral proceeding the guardian's deed could not be declared void because the bond filed for the purpose of obtaining ~~the~~ the license to sell the real estate was not formally approved: *Emery v. Vroman*, 19 Wis. 689; 88 Am. Dec. 726; *Pursley v. Hayes*, 22 Iowa, 11; 92 Am. Dec. 350; *Hamiel v. Donnelly*, 75 Iowa, 93.

8. That no sufficient notice of the sale was given. The guardian, in his report to the court of his proceedings under the license granted him to sell the real estate of his wards, stated that he gave due and public notice of the time and place of the sale by posting up in three of the most public places in Douglas county three notices of the time and place of the sale, and by publishing such notice in the *Omaha Weekly Herald*, a newspaper printed and in general circulation in said county, for three weeks successively next before the date of said sale. There is no dispute but that the notice of the sale was published for three weeks in the newspaper as was stated in the guardian's return of his proceedings to the court. No copy, however, of the posted notices was found in the files of the records of the proceedings of the guardian's sale. The district court which granted the license to make the sale, in its order confirming the same, made a finding that the proceedings of the guardian in making the

sale had been in all respects regular and in conformity to law. We think that it must be presumed, especially when this sale is attacked collaterally, that sufficient evidence was offered to the court, when the sale came on for confirmation, that the notices thereof had been posted as the statute required and the guardian reported.

9. That the sale was not made by the guardian personally. We have not been cited to any authority or statute showing that a sale of real estate made by a guardian is void because the guardian did not personally attend or cry the sale. It certainly cannot be said that because the statute says that a guardian may file his petition and procure the order of a court under certain circumstances for the sale of his ward's real estate, that therefore the guardian must draw the petition and the other papers in such proceeding ^{§ 67} and attend to it personally, and cannot do the same by an attorney; and we see no good reason why a guardian may not intrust the conduct of the sale of the real estate which he is making to his attorney or an auctioneer; and we are quite clear that this sale is not void because the attorney of the guardian actually made or cried the sale of the property.

10. That the description of the property sold was ambiguous and indefinite. The property sold by the guardian to McGavock is described in the guardian's report to the court as "the N. E. two-thirds ($\frac{2}{3}$) of lot eight (8) in block two hundred and three (203) of the city of Omaha, being all that portion of said lot eight (8) not belonging to the Union Pacific Railway Company." This description, while not very definite, was not void for uncertainty. It was a sufficient description to enable the property to be identified. An examination of all the proceedings on which the deed is based, made by the guardian of the minor heirs of Henry B. Myers, deceased, to Alexander McGavock, leads us to the conclusion that such proceedings and deed were and are valid, and that the said minor heirs were, by said proceedings and deed, divested of all their title in and to the real estate conveyed by their guardian to McGavock. There is one feature, however, in McGavock's title that remains to be considered. Fanny B. Myers, the widow, and Stephen Myers, the adult son of Henry B. Myers, deceased, are plaintiffs in error here and were plaintiffs below. Have these parties any interest remaining in the real estate conveyed to McGavock by Philip S. Myers? This widow and son appeared in the proceeding

instituted by the guardian to sell the real estate of his wards, and consented that the district court of Douglas county should grant a license as prayed for by the guardian. This widow at that time had a dower interest in this land and the adult son was one of the owners. Does it follow that because this widow and adult son entered their appearance ^{see} and consented to the proceedings instituted by the guardian of the minors to sell their real estate, the guardian, in making such sale, sold the interests of the widow and the adult son therein? We do not think that such a conclusion results. The guardian was not the guardian of the widow nor of the adult son, nor had he any authority to sell their interest in any real estate, nor did the district court of Douglas county have jurisdiction or authority to authorize him to sell their real estate. In fact, the guardian did not attempt to sell their real estate, but only the interests of his wards therein. The court did not authorize him, and could not authorize him, to sell any thing more than the interest of his wards in the lot. The appearance entered and the consent given by the widow and adult son to the proceeding was to avoid the formality of serving a formal notice on them of the proceedings. Such appearance and consent made them parties to the proceeding, but it does not follow that because they were parties that such sale and conveyance of the minors' interest divested the interest of the adult son and the widow in the real estate sold by virtue of such proceeding. We do not say that in a proceeding by a guardian to sell the real estate of his minor wards the adult heirs might not make themselves parties to such proceeding and take such steps therein, by pleading, disclaimer, or otherwise, so that a sale and deed made in pursuance of such proceeding by the guardian would divest the interest of such adult heirs or other persons interested in the real estate; but we do say that this record does not disclose that the proceedings had by the guardian and the sale and deed of the real estate made by him pursuant to said proceedings were intended to, or did, divest the interest which the widow and adult son had in this real estate. This point is not argued, except perhaps incidentally, by counsel, but we have thought it but right that every point connected with the proceedings on which the title of the defendants in error depends ^{see} should be considered to avoid possible future trouble and to set at rest the title of the real estate in question so far as the defendants in error are concerned. McGavock, as a de-

fense to this action, pleaded and proved in the court below that he had been in the open, exclusive, notorious, and adverse possession of the premises purchased by him at the guardian's sale for more than ten years prior to the bringing of this action. During all this time he had occupied the premises under a claim of title thereto, and it does not appear that either the widow or the adult son ever paid any taxes on these premises during all this time, nor in any other manner asserted any claim of title or ownership thereto. Now, this widow and adult son, having voluntarily made themselves parties to this proceeding, were charged with notice of what was done therein. The court, by its order confirming the sale, directed the guardian to pay this widow a stated sum in lieu of her dower interest in the property, and to the adult son his distributive share, as heir, of the proceeds of the sale. This order was made by the court on the theory that McGavock had acquired by his purchase not only the interest of the minors in the real estate sold, but that of the widow and adult son as well. McGavock entered into possession of the real estate then, not as a cotenant of the widow and adult son, but under a claim of title in himself to the whole property, and this entry of McGavock, and the proceedings on which his possession was based, all being with notice to the widow and adult son, operated as an ouster of the widow and adult son, and McGavock's possession from its incipency was adverse. This adverse possession, then, of McGavock to this real estate had, at the time this suit was brought, vested in him whatever title the widow and adult son had previously had therein. It is by reason of this adverse possession and the statute of limitations, rather than by reason of the guardian's proceedings and sale of the land, that the interest therein of the adult son and widow has been divested. ⁸⁷⁰ "One who has been in the open, notorious, exclusive, and adverse possession of real estate for ten years becomes vested with a valid title to the same": *Parker v. Starr*, 21 Neb. 680.

We next turn our attention to the consideration of the claim of title of the Union Pacific Railway Company to the portion of the property in controversy occupied by it. This corporation is in possession, claiming title to a portion of that part of the lot in controversy occupied by it by virtue of a conveyance from McGavock and his wife, under date of March 22, 1877. We have already seen that McGavock's title to this

property was acquired by virtue of the guardian's deed and the proceedings on which the same was based. It is now argued by counsel for plaintiffs in error that the Union Pacific Railway Company was incompetent to take the title of this property by the conveyance from McGavock, and this contention is predicated on section 8, article 11, of the constitution of 1875, which is as follows: "No railroad corporation, organized under the laws of any other state, or of the United States, and doing business in this state, shall be entitled to exercise the right of eminent domain, or have power to acquire the right of way, or real estate, for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state." The Union Pacific Railway Company is, and was at that time, a corporation organized under the laws of the United States, and by reason of the constitutional provision just quoted was incompetent to take title to the real estate by the conveyance from McGavock; but this conveyance is not, therefore, void. It is, at most, voidable. Its title is valid against every one but the state, and can be divested only by proceedings brought by the state for that purpose: Norval, J., in *Carlow v. Aultman*, 28 Neb. 672. The Union Pacific Railway Company, because it took title to this property in violation of the constitution, did not thereby become ⁸⁷¹ an outlaw; nor does the fact of its incompetency to be a grantee of such property authorize any one to appropriate the property who may see fit to bring a suit for that purpose. The citizen has no right, title, or claim, as such, to property attempted to be acquired in contravention of law, whether the person attempting such acquisition be an English lord, a Turkish pasha, or an ordinary foreign railroad company. It would be a monstrous construction of this constitution to say that if A should, for a valuable consideration, convey his real estate to B, that because B was incompetent under the law to take such conveyance, that therefore the title should revert to A. It remains to be said of the part of the property occupied by this corporation which it attempted to acquire from McGavock, that the incompetency of the corporation to take the title does not in any manner help the claims of the plaintiffs in error, the widow and adult son of Henry B. Myers, deceased, whose title, we have seen, to this part of the real estate was not divested by the guardian's sale. The statute of limitations began to run when McGavock entered under his guardian's

deed, and his conveyance and surrender of possession of part of the premises to a grantee incompetent to take did not arrest the running of the statute. But the railway company, like McGavock, pleaded and proved that it had been in the open, notorious, exclusive, and adverse possession of this real estate, claiming title thereto, for more than ten years prior to the bringing of this suit. This adverse possession then vested the title to the real estate occupied by the railway company in it as against all persons except the state of Nebraska.

The right to the possession of the other portion of the real estate occupied by the railway company was acquired on the twelfth day of May, 1871, in pursuance of a writing in words and figures as follows:

"Be it known that I, Philip Myers, of the city of Chicago, state of Illinois, as administrator of the estate of ²⁷³ Henry B. Myers, deceased, late of the county of Mahaska, and state of Iowa, and also as agent of Stephen B. Myers, one of the children and heirs, and as guardian of the property of Harry B. Myers, Sarah E. Myers, and Susan B. Myers, remaining children and minor heirs at law of said Henry B. Myers, who died seised of lot number eight (8), in block two hundred and three (203), in the city of Omaha, Douglas county, have received from the Union Pacific Railway Company the sum of fifteen hundred dollars in the bonds of said city, in full payment and satisfaction of the damages accrued and awarded by reason of appropriation of a part of said lot eight (8), in block two hundred and three (203), in said city, by said Union Pacific Railway Company for depot grounds. . . .

"Witness my hand at the city of Chicago, Illinois, this 12th day of May, A. D. 1871.

"PHILIP MYERS,

"Administrator of the estate and agent and guardian of heirs, as the friend of Henry B. Myers, deceased."

Section 96 of chapter 16 of the Compiled Statutes of 1893, in force at the date of said writing quoted above, provides: "Whenever any railroad corporation shall take any real estate as aforesaid of any minor, insane person, or any married woman whose husband is under guardianship, the guardian of such minor or insane person or such married woman with the guardian of such husband may agree and settle with said corporation for all damages or claims by reason of the taking of such real estate and may give valid releases and discharges therefor." The evidence shows that

the Union Pacific Railway Company has been in possession of the real estate, using and occupying it for railroad purposes, since the date of said writing or receipt quoted above. The able counsel for plaintiffs in error say: "Said receipt does not purport to be a settlement under said section 96, but on its face shows that it is a mere receipt for the amount of an award which had previously ^{§73} been made in some other proceeding; that the language of the receipt indicates the railway company had in some proceeding appropriated the portion of the lot referred to for depot grounds, and that an award of damages for such appropriation had been made in favor of the owners of said real estate; that the real source of title of the railway company to the property in question is the proceeding for the appropriation of said lot and not the receipt." We think the deductions made by counsel are reasonable and probably correct, but we do not see how that helps their clients' case. The argument, in brief, is that the Union Pacific Railway Company, some time prior to May, 1871, had instituted condemnation proceedings, and in pursuance thereof took possession of this real estate, and that the amount of money paid to Philip Myers as guardian was the amount awarded as damages to the minors by reason of the appropriation of such real estate by the railway company, and that, as the railway company was a corporation created under the laws of the United States, or, in other words, that it was not a domestic corporation, it had no power or authority to exercise the right of eminent domain in this state; and that section 96, quoted above, is only applicable to domestic corporations. This section is a part of the general railroad corporation act in force at the time that the railroad company appropriated the property in controversy. The constitution of 1866, in force at that time, did not prohibit foreign railroad companies from building or operating roads in this state; and, since foreign railroad corporations were not then prohibited by the constitution or the laws from building and operating their roads in this state, we do not know of any rule of law or comity which prevented their acquiring, by purchase or settlements made for damages, the right to occupy and use such real estate as they needed. It is no doubt true that it was competent, then and now, for the legislature to prohibit a foreign railroad company from exercising ^{§74} the powers of eminent domain in this state, but, in the absence of legislation and in

the absence of any constitutional provision on the subject, we cannot say that the appropriation of this property with the guardian's consent was wrongful or illegal. It is true that some sections of the act, of which said section 96 is a part, apply exclusively to domestic corporations, but we think that the provisions of that act, in so far as they are applicable, apply not only to railroad corporations organized under the laws of this state, but also to all railroad corporations operating roads in this state. Certainly it is true that the authority of the railway company to operate its road, and to acquire by contract with the owner the necessary real estate for that purpose, is a question which cannot be inquired into in an action of this character. But whether the railway corporation had the right to exercise the power of eminent domain and condemn the real estate in controversy is, under the evidence here, wholly immaterial, as the receipt affords evidence that if the railway company did appropriate this property by condemnation proceedings, it also acquired the right to the possession of it by means of a settlement made with the guardian of the minor heirs in pursuance of said section 96. It certainly cannot be questioned but that this railway corporation might have taken a deed of conveyance of this real estate for railroad purposes from Henry B. Myers, had he been living, and had it done so and entered into possession of the real estate his heirs would not be entitled to oust the railway company therefrom whether the corporation had the right to build and operate a road in this state at that time or not. We have been cited to no authority, and indeed the argument has not been advanced, that it is not competent for the legislature to provide that the legal guardian of minor heirs may make settlement with a railway corporation for damages to their real estate by reason of its occupancy by a railway company. Counsel say, however, that the act of Congress under which the railway ⁸⁷⁵ company exists provides in what manner settlement shall be made with a minor when his real estate is taken for railway purposes, and that as the receipt is not in conformity with this provision of the act of Congress, that it is no protection to the railway company. There are several things to be said of this argument. It is competent for the United States government, for its own purposes, to exercise the powers of eminent domain in any state of this union. If Congress can delegate the power to exercise the right of eminent domain in

the states to a corporation created by the laws of Congress, which we by no means concede, then, in that case, such corporation, in the exercise of such power, would have to comply with the laws of the state where it exercised such power. The provision cited by counsel from the act of Congress probably had reference to the exercise of the power of eminent domain by the railway company in the territories of the union, and where land was appropriated, the possession of which was in the citizen, but the legal title to which was still in the United States government. It is also to be remembered that a railway corporation does not acquire the absolute fee simple title to real estate purchased or condemned by it for railway purposes, but only an easement therein, subject to be divested by nonuser or abandonment; hence the provisions in said section 96, which authorize guardians of minors, whose real estate has been appropriated for railway purposes, to give valid releases and discharges for the damages sustained by such minors. It remains to be said of this portion of the real estate under consideration, that the widow and adult son of Henry B. Myers, deceased, at the time of the execution of the receipt to the railway company by the guardian, quit-claimed all their interest in said real estate to said railway company.

Aware of the grave importance of the questions involved in this record we have held this case for some time, and it has been examined by the commissioners and the ⁸⁷⁶ judges, and the views expressed herein embody the unanimous opinion of the court. We have patiently and carefully considered all the points and arguments made by the counsel for the plaintiffs in error, and have reached the conclusion that the plaintiffs in error are not entitled to the possession of any of the real estate sued for herein, and that the learned district judge was entirely right in instructing the jury to find a verdict for the defendants in error. It follows that the judgment of the court below must be, and the same is, affirmed.

NATURAL GUARDIAN HAS NO CONTROL OVER WARD'S ESTATE: *Ohio etc. R. R. Co. v. Tindall*, 13 Ind. 366; 74 Am. Dec. 259; *Linton v. Walker*, 8 Fla. 144; 71 Am. Dec. 105, and note; note to *Johnson v. Johnson*, 29 Am. Dec. 89.

GUARDIAN AND WARD—PARTIES.—Minors need not be made parties to a proceeding by their guardian to procure an order of sale of their property, as the application is for their benefit: *Fitzgibbon v. Lake*, 29 Ill. 165; 81 Am. Dec. 302. Nor is a guardian *ad litem* for them required: *Smith v. Race*, 27

Ill. 387; 81 Am. Dec. 235. *Contra*, see *Loyd v. Malone*, 23 Ill. 43; 74 Am. Dec. 179.

GUARDIAN'S OR ADMINISTRATOR'S SALE WITHOUT NOTICE OR WITH INSUFFICIENT NOTICE, EFFECT OF: See *Gibson v. Roll*, 27 Ill. 88; 81 Am. Dec. 219, and note.

GUARDIAN'S SALE OF WARD'S LAND WILL NOT BE SUSTAINED without proof that it was necessary for the infant's support and education: *Loyd v. Malone*, 23 Ill. 43; 74 Am. Dec. 179.

ADOPTED STATUTES FROM ANOTHER STATE, GENERAL RULE AS TO: See *Van Matre v. Sankey*, 148 Ill. 536; 39 Am. St. Rep. 196; *Pratt v. Miller*, 109 Mo. 78; 32 Am. St. Rep. 656, and note.

GUARDIAN AND WARD.—WANT OF FORMAL APPROVAL OF GUARDIAN'S BOND, EFFECT OF: *Emery v. Vroman*, 19 Wis. 689, 88 Am. Dec. 726, showing that it is a mere formality, and will not invalidate the sale of the ward's land in a collateral action.

GUARDIAN AND WARD—EFFECT OF IRREGULARITIES IN SALES—COLLATERAL INQUIRY.—The interests of infants and purchasers alike require that guardians' sales should not be held invalid for every departure from some directory provision of the statute, or for error of decision in courts ordering these sales: *Pursley v. Hayes*, 22 Iowa, 11; 92 Am. Dec. 350, and note. Whether such a sale is in compliance with the order is for the court to determine, upon confirmation of the sale, and is not the subject of collateral inquiry: *Pursley v. Hayes*, 22 Iowa, 11; 92 Am. Dec. 350, and note.

POWER OF FOREIGN GUARDIAN OVER WARD'S ESTATE: See note to *Earl v. Dresser*, 95 Am. Dec. 666.

GUARDIAN AND WARD—SALE OF WARD'S REAL PROPERTY.—Unless authorized by a court of competent jurisdiction, a guardian has no authority to sell his ward's real property, and this authority is derived wholly from the statute: See note to *Fessenden v. Jones*, 75 Am. Dec. 450.

GUARDIAN AND WARD—EVIDENCE.—THE RECORD OF A GUARDIAN'S SALE is admissible in defense to ejectment in behalf of one claiming under such sale, if the court ordering the sale had jurisdiction to make the order: *Fitzgibbon v. Lake*, 29 Ill. 165; 81 Am. Dec. 302.

ADVERSE POSSESSION—TITLE ACQUIRED BY.—An adverse possession for the period required by law confers a title on which a party may maintain ejectment: *Crockett v. Lashbrook*, 5 T. B. Mon. 531; 17 Am. Dec. 98.

POWER OF FOREIGN CORPORATIONS TO ACQUIRE TITLE TO REAL PROPERTY: See note to *Page v. Heineberg*, 94 Am. Dec. 383, showing that a corporation chartered in one state may acquire and hold lands in another state.

FOREIGN CORPORATIONS—STATUTE OF LIMITATIONS.—A foreign corporation is a person "out of the state," and cannot avail itself of the statute of limitations: *Larson v. Aultman etc. Co.*, 86 Wis. 281; 39 Am. St. Rep. 893, and note.

CONVEYANCE PENDING ADVERSE POSSESSION, and without entry, is void as against the adverse claimant: See note to *Peabody v. Hewett*, 83 Am. Dec. 498.

RICHARDS v. COMMISSIONERS OF CLAY COUNTY.

[40 NEBRASKA, 45.]

TAXES.—A TAX IS NOT A DEBT capable of enforcement generally by a civil action. If an action is permitted, it is only because the statute expressly provides therefor, or by failing to provide any method, necessarily implies a right of action.

TAXES—METHOD OF ENFORCEMENT AND COLLECTION—ACTION.—A method prescribed by statute of enforcing and collecting taxes is exclusive; and, if the statute embraces a right of action, the conditions and manner of the action, as specified by the statute, must be strictly observed, or the action will not lie.

STATUTORY CONSTRUCTION.—A special provision in a statute relating to a specific subject matter controls general provisions therein.

Sedgwick & Power, for the appellant.

William M. Clark, for the defendant.

⁴⁵ IRVINE, C. The county commissioners of Clay county began this action in the district court of York county against Sanford ⁴⁶ Richards, Edward Bailey, and David Bailey, alleged to have been copartners under the firm name of Richards, Bailey & Bailey, to recover certain personal taxes assessed and levied for the year 1888 upon corn owned by the firm, and, at the time of the assessment, stored in cribs in Clay county. The petition, in addition to the above facts, avers that before the tax became due and delinquent the defendants sold and removed all their personal property out of Clay county; that a distress warrant was issued in Clay county and returned unsatisfied; that the firm has no partnership property out of which to make the tax. Judgment is prayed against the individuals composing the firm for the amount of the tax.

An affidavit for attachment was filed and lands of the defendant Richards were attached. The grounds of attachment were that the firm had converted and removed all its copartnership property into money and out of the county for the purpose of placing it beyond the reach of the plaintiffs; had absconded with intent to defraud the plaintiffs, and that each and all of the defendants were nonresidents of the state of Nebraska.

No service of summons was had except upon Richards. The proceedings in the case were somewhat complicated, and suggest a number of questions relating to practice; but the conclusion reached upon the principal question involved

avoids the necessity of detailing the proceedings and of deciding other questions.

To the petition there was finally filed an answer in the nature of a plea in abatement. This answer alleged that the defendant had not resided in York county since 1887; that York county was not his place of abode or adopted residence; that the tax claim set out in the petition had never been forwarded to the county treasurer of York county, nor to any tax-collector of York county; and that the action had never been authorized by the county treasurer, nor any tax-collector of York county. These allegations ⁴⁷ were all admitted by the reply. The answer further averred that the plaintiffs had no legal capacity to sue; that the court had no jurisdiction of the subject matter of the action, and that there was a defect of parties defendant. These latter allegations were denied, but they are all conclusions of law.

The case was tried upon the pleadings without any evidence, and judgment rendered for the plaintiffs, from which the defendant Richards prosecutes error.

The action is one aided by attachment by the commissioners of Clay county in the district court of York county to collect personal taxes levied in Clay county against one who is a nonresident of the state. Will such an action lie?

Judge Cooley, in his work on Taxation, second edition, page 16, states that in general the conclusion reached by the courts has been that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie. Numerous authorities are cited in support of that doctrine. Similar language in the first edition of Cooley on Taxation was cited with approval by this court in *Nebraska City v. Nebraska City etc. Coke Co.*, 9 Neb. 339, where it was held, after a review of the authorities, that in a suit against a city to recover for gas furnished it, taxes due the city from the gas company could not be set off, and this for the reason that the method provided by statute for the enforcement and collection of taxes is exclusive.

In *Millett v. Early*, 16 Neb. 266, it was held that where the person bound to pay the taxes had died, a claim therefor was properly filed against his estate, but the doctrine of *Nebraska City v. Nebraska City etc. Coke Co.*, 9 Neb. 339, was expressly adhered to, and the decision of the court was upon the ground

that the filing of a claim against an estate is not an action; the court saying: "While such taxes ⁴⁸ are not a debt in the ordinary meaning of the word, they do constitute an obligation imposed by law, for which the estate is liable."

The law is further announced in Cooley on Taxation, page 435, as follows: "Sometimes a right to bring suit is expressly given, and, where it is, the statute must be closely followed, and any conditions which are named must be observed." How strictly it is necessary, in the collection of taxes, to follow the method prescribed by statute may be seen by a consideration of any of the cases upon the subject. We will, however, refer particularly to *New York etc. R. R. Co. v. Lyon*, 16 Barb. 651; *State v. Jones*, 24 Minn. 86; *Washington County v. German-American Bank*, 28 Minn. 360.

We think it is well settled, therefore, that a tax is not a debt capable of enforcement generally by civil action; that, where an action is permitted, it is only because the statute expressly provides therefor, or, by failing to provide any method, necessarily implies a right of action; and further, that when the statute does provide a method of enforcing and collecting taxes such method is exclusive; and, if it embraces a right of action, the conditions and manner of the action, as specified by the statute, must be strictly observed.

Our present revenue law does contain provisions for the enforcement and collection of personal taxes. Section 89 of that law is as follows:

"SEC. 89. No demand for taxes shall be necessary, but it shall be the duty of every person subject to taxation under the laws of the state to attend at the treasurer's office at the county seat and pay his taxes; *provided*, that in counties under township organization the town collector shall, as soon as he receives the tax-book or books, call at least once on the person taxed at his place of residence or business, if in town, city, or village, and shall demand payment of the taxes charged to him on his property. And if any person neglect so to attend and pay his ⁴⁹ personal tax, or shall neglect and refuse after being called upon by the town collector, until after the first day of January next after such taxes become due, the treasurer, either by himself or deputy, or the sheriff of the county, when directed by distress warrant issued by said treasurer to said sheriff, or the town collector, is directed to levy and collect the same, together with the penalty and costs of collection, by distress and sale of personal property

belonging to such person in the manner provided by law for the levy and sale on execution, and the treasurer and town collector shall be entitled to the same fees for their services as are allowed by law for selling property under execution; *provided*, that in case no personal property of the delinquent can be found, it shall be the duty of the treasurer and town collector, when directed so to do by order of the board of county commissioners, or the board of supervisors, to commence suit by civil action in the district court of said county in the same manner as other civil actions are commenced, and prosecute the same to judgment and collection by attachment, execution, or garnishment, as the case may require and that no property whatever shall be exempt from levy and sale under process issued on the judgment obtained in such action, and, in case judgment shall be recovered, costs shall follow the judgment without regard to the amount of said judgment; *provided, further*, that in case any person having personal property assessed, and upon which the taxes are unpaid, shall, in the opinion of the treasurer and town collector, be about to remove out of the county, or in any other manner seek to put his personal property out of the reach of the treasurer or collector, it shall be the duty of the treasurer and town collector to collect such taxes by distress or attachment, as the case may require, at any time after the tax has become due. In case any person owing taxes remove, the treasurer and town collector shall, among other steps to collect such tax, forward, when necessary, such tax claim to the treasurer or ⁵⁰ tax-collector at the adopted residence or place of abode of such tax-debtor, and such taxes shall be collected at the latter place as other personal taxes, by distress or civil action, as the case may require, and return to the proper county, less such charges for collection, as are hereinbefore provided. And such treasurer, or tax-collector, to whom such tax claim shall be so forwarded, is hereby authorized to commence and prosecute to judgment such civil action as may be necessary in the district court of such county, in the name of the board of county commissioners, or the board of county supervisors, of the county from which such tax claim shall be forwarded, immediately upon receipt thereof by him, upon which judgment, without regard to the amount thereof, the plaintiff shall recover costs, and such judgment shall have the same effect as hereinbe-

fore provided when suit is brought in the county where such tax is levied."

It will be observed that the section quoted authorizes actions in three cases only: 1. Where no personal property of the delinquent can be found the treasurer or town collector, when directed so to do by the commissioners or supervisors, may commence an action in the district court of the county where the tax is levied; 2. If any person having personal property assessed shall, in the opinion of the treasurer or town collector, be about to remove out of the county, or in any other manner seek to put his personal property out of the reach of the treasurer or collector, the treasurer and collector shall collect such taxes by distress or attachment, as the case may require; and 3. If any person owing taxes remove, the treasurer and town collector shall forward such tax claim to the treasurer or tax-collector at the adopted residence or place of abode of such taxpayer, where the taxes may be collected by distress or civil action. In the last case the treasurer or tax-collector to whom such claim is forwarded is authorized to institute the action in the name of the ⁵¹ commissioners or supervisors of the county from which such tax claim was forwarded.

No other provisions for suit are found. This case is not within any of these classes. The suit was not brought in Clay county, where the tax was levied. York county was not the adopted residence or place of abode of the taxpayer, nor had the tax claim been forwarded to the treasurer or any collector of York county, nor has the treasurer or any collector of York county authorized the bringing of the suit.

Counsel for the defendants in error cite us to section 59 of the Code of Civil Procedure, which provides that actions against nonresidents other than those mentioned in former sections relating to real estate "may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found." But this section is not applicable. It would be if the revenue law gave generally a right of action to collect taxes, but the right of action itself is given by the revenue law, and extends only to the cases therein specified. Such an action is governed by the provisions of that act. A special provision in a statute relating to a specific subject matter controls general provisions: *McCann v. McLennan*, 2 Neb. 286; *Tecumseh Townsite case*, 3 Neb. 267; *People v. Gosper*, 3 Neb. 310;

Albertson v. State, 9 Neb. 429; *Richardson County v. Miles*, 14 Neb. 311.

But the question really lies deeper than the mere determination of the forum by statutory construction. The right of action, where it exists at all, is given only by section 89 of the revenue act, and that statute prescribes the forum in which the action must be brought. It is clear that in a case where a tax-debtor is about to remove from the county, the action must be brought in the county where the tax was levied. It is probable that after he has succeeded in removing from the county, and in removing all his property therefrom, the action might still be brought in ⁵² that county, and, in case he had removed from the state so that the last provision could not have effect, attachments might be issued from the county where the action was brought, under section 202 of the code, to counties where he might have property. That question is not, however, before us for determination. It is sufficient to say that this action was not properly brought. The district court of York county did not have jurisdiction, and therefore the judgment is reversed and the action dismissed.

Post, J., not sitting. —

RECOVERY OF PERSONAL JUDGMENT FOR TAXES—1. IN CASES OF COLLECTION OF ORDINARY TAXES BY SUIT.—(a) General Review of Authorities—Nature of Taxes. It will be found that statutes imposing taxes make, as a general rule, special provisions for their collection, but these sometimes fail, and the question then arises whether the tax must also fail, or whether resort may be had by the state to such remedies as would be available to individuals to enforce demands owing to themselves. The same question arises if the law levying a tax has made no provision whatever for its collection.

A tax has sometimes been held to be a "debt": *Mayor v. McKee*, 2 Yerg. 167; *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641; *City of Dubuque v. Illinois Cent. R. R. Co.*, 39 Iowa, 56; *City of Burlington v. Burlington etc. R. R. Co.*, 41 Iowa, 134; but the better opinion is that it is not a "debt" in the ordinary sense of that term: See monographic note to *City of New Orleans v. Great Southern etc. Co.*, 8 Am. St. Rep. 507; *Newport etc. Bridge Co. v. Douglass*, 12 Bush, 673; *City of Carondelet v. Picot*, 38 Mo. 125; *State v. Southwestern R. R.*, 70 Ga. 11; *Dunlap v. County of Gallatin*, 15 Ill. 7; *State v. Yellow Jacket etc. Min. Co.*, 14 Nev. 220; *Lane County v. Oregon*, 7 Wall. 71, 80; and that a common-law action for the recovery of a tax as a debt will not lie: *Andover etc. Corporation v. Gould*, 6 Mass., 40, 44; 4 Am. Dec. 80; *Crapo v. Stetson*, 8 Met. 393; *City of Camden v. Allen*, 26 N. J. L. 398; *Packard v. Tisdale*, 50 Me. 376; *Richards v. Stogsdell*, 21 Ind. 74; *State v. Southwestern R. R.*, 70 Ga. 11; *Hibbard v. Clark*, 56 N. H. 155; 22 Am. Rep. 432; *City of Detroit v. Jepp*, 52 Mich. 458; *Board of Education v. Old Dominion etc. Co.*, 18 W. Va. 441. A county cannot enforce the payment of county taxes by a

bill in chancery in the nature of a creditor's bill: *Durant v. Supervisors of Albany County*, 26 Wend. 66. There are cases holding that no action can be maintained to compel the payment of state, county, town, or parish taxes, except in the particular cases in which an action is expressly given by statute: *Andover etc. Corporation v. Gould*, 6 Mass. 40, 44; 4 Am. Dec. 80; *Orapo v. Stetson*, 8 Met. 393; *City of Camden v. Allen*, 26 N. J. L. 398; *Packard v. Tisdale*, 50 Me. 376; *Richards v. Stogsdell*, 21 Ind. 74; *State v. Southwestern R. R.*, 70 Ga. 11; *Staley v. Township of Columbus*, 36 Mich. 38; *Hibbard v. Clark*, 56 N. H. 155; 22 Am. Rep. 432; *City of Detroit v. Jepp*, 52 Mich. 458; *Stafford County Commrs. v. First Nat. Bank*, 48 Kan. 561; *Board of Education v. Old Dominion etc. Co.*, 18 W. Va. 441; *Crimson v. Reich*, 2 Utah, 111. For peculiar circumstances under which a personal judgment for taxes is unauthorized, see *State v. Hoyt* (Mo.), 27 S. W. Rep. 382; *Montezuma Valley etc. County v. Bell* (Col.), 36 Pac. Rep. 1102; *Myers v. McRay* (Mo.), 21 S. W. Rep. 730. A statute prohibiting an action to collect taxes is valid: *Davenport v. Sadler*, 48 Kan. 311. These authorities would prevent a municipal corporation from suing to recover a tax unless authorized by statute. In other words, a municipal corporation could not provide for the collection of taxes by a suit against the taxpayer, unless the power was specifically delegated by its charter: *City of Carondelet v. Picot*, 38 Mo. 125.

But a tax is generally regarded as a personal obligation. It is a charge, not merely upon the property assessed, but a personal charge against the taxpayer. Taxes are imposed on the person of the owner, notwithstanding property is resorted to for the purpose of ascertaining the amount thereof; and there is a personal obligation imposed upon the taxpayer to pay taxes independently of the value of the property assessed. Upon this principle it has been held, in a great many cases, that an action at law will lie to recover a tax, and that a personal judgment in such a case is proper. The imposing of a tax also imposes a duty upon the taxpayer, and it is wholly immaterial to consider whether the tax is a debt in the sense of a money obligation existing by contract. The government has the same right to enforce a duty as a debt, and may enforce it in the same way. As supporting these views, see *People v. Seymour*, 16 Cal. 332; 76 Am. Dec. 521; *Perry v. Washburn*, 20 Cal. 318, 351; *City of Oakland v. Whipple*, 39 Cal. 112; *San Francisco v. Phelan*, 61 Cal. 617; *County of Sacramento v. Central Pac. R. R. Co.*, 61 Cal. 250; *State v. Southern Steamship Co.*, 13 La. Ann. 497; *Succession of Mercier*, 42 La. Ann. 1135; *Biggins v. People*, 96 Ill. 381; *State v. Yellow Jacket etc. Min. Co.*, 14 Nev. 220; *Mayor v. McKee*, 2 Yerg. 167; *Smith v. People*, 3 Ill. App. 380; *McLean v. Manhattan Medicine Co.*, 22 Jones & S. 371; *City of New Orleans v. Cassidy*, 27 La. Ann. 704; *City of New Orleans v. Day*, 29 La. Ann. 416; *United States v. Pacific R. R.*, 4 Dill. 66; *Greer v. City of Covington*, 83 Ky. 410. Taxes due the United States may be sued for and recovered in the name of the United States in any proper form of action: *Dollar Savings Bank v. United States*, 19 Wall. 227; *Post v. Taylor County*, 2 Flap. 518; *United States v. Pacific R. R.*, 4 Dill. 66; and personal judgment be rendered for the amount due: See same cases.

(b) *Suit for Balance—Forfeited Property.*—The commonwealth cannot, however, after suing and recovering judgment for taxes due for certain years, maintain another action to recover an alleged balance for those years: *Newport etc. Bridge Co. v. Douglass*, 12 Bush, 673. Under the Illinois statute in all cases where there has been a forfeiture of land for the taxes

due thereon, an action of debt lies against the owner, notwithstanding omissions or irregularities have occurred in the tax proceedings which would be fatal to a tax title founded thereon. A forfeiture, in fact, of delinquent land at a regular tax sale, for the taxes legally due thereon, is sufficient to charge the owner personally in an action against him for such taxes. In such an action irregularities in the prior proceedings to collect the taxes will not be inquired into: *Sanderson v. Town of La Salle*, 117 Ill. 171; *Ohio etc. Ry. Co. v. Commissioner of Highways*, 117 Ill. 279. This statute providing that suit may be brought against the owner for the amount of tax due upon forfeited property is not in conflict with the provisions of the constitution of that state notwithstanding the existence of other constitutional provisions providing for the sale and redemption of real estate for the nonpayment of taxes, as they do not, in terms or by implication, limit the legislative power as to any other mode of collection. The legislature may adopt such modes of collection as may seem most efficient, including, of course, ordinary actions *in personam*, to recover the amount due: *Smith v. People*, 3 Ill. App. 380.

(c) *Owner not Liable for Taxes Assessed Against Another.*—The owner of real estate is not, however, personally liable for taxes assessed against another as the owner: *City of Jefferson v. Mock*, 74 Mo. 61. Thus, if the statute provides that “the owner of property, on the first day of May in any year, shall be liable for the taxes of that year,” and that “the purchaser of property on the first day of May shall be considered the owner on that day”; this, by implication, excludes the idea of a personal action against any person other than such owner. The purchaser of property would not become personally liable, by virtue of such a statute, for any taxes assessed, and which were due and unpaid, for years prior to that in which he became the owner, but only for such as might be assessed for the year or years in which he was the owner on the first day of May; and this statute is not affected by the provisions of another statute which does not enlarge its provisions as to the persons who shall be personally liable for the tax: *Biggins v. People*, 96 Ill. 381.

(d) *Validity and Conclusiveness of Judgment.*—A judgment against land for taxes does not, in Illinois, necessarily conclude the owner. Thus a judgment in the county court for taxes is not conclusive upon the owner of the liability of the land for the taxes assessed upon it, if he does not appear and contest the application for judgment, but he may still question the legality of the tax in another proceeding, as on bill to set aside the tax deed as a cloud upon his title. But if he appears and contests the application he will be concluded by the judgment, the same as in any other case: *Belleville Nail Co. v. People*, 98 Ill. 399; *Gage v. Bailey*, 102 Ill. 11.

If a lien conferred by law is a charge merely on each separate tract of land for the taxes assessed thereon, a personal judgment against the owner of several tracts of land declaring a lien upon all the tracts for the aggregate taxes due on all is erroneous, whether the tax was due a municipal corporation or the state: *Edmonson v. City of Galveston*, 53 Tex. 157.

(e) *To Sustain an Action for Unpaid Taxes* there must be a demand, if the statute requires it. It is, in such a case, a condition precedent to the action, and the action itself is not a sufficient demand: *McLean v. Manhattan Medicine Co.*, 22 Jones & S. 371. A suit for taxes is summary, and is not to be tried by a jury: *City of New Orleans v. Cassidy*, 27 La. Ann. 704. Taxes do not bear interest in the absence of authority allowing it: *State v. Southwestern R. R.*, 70 Ga. 11; *Edmonson v. City of Galveston*, 53 Tex. 157; and

the statute of limitations applies to suits brought by the state for the collection of delinquent taxes: *State v. Yellow Jacket etc. Min. Co.*, 14 Nev. 220. Such suits are governed by the provisions of the civil practice act so far as they are not inconsistent with the revenue laws: See case last cited.

(f) *Effect of Failure to Provide Remedy.*—It is no insuperable obstacle to the collection of a tax that the state, after imposing it, has provided no mode by which it can be collected; and an action by the state for the collection of the tax, though not authorized by the statute, has been considered to be warranted by usage: *State v. New York etc. R. R. Co.*, 60 Conn. 326; *Texas Banking etc. Co. v. State*, 42 Tex. 636. However that may be, such an action is justified upon the ground that, if a statute creates a right and gives no remedy, the party may resort to the usual remedy applicable to such a case: *State v. Severance*, 55 Mo. 378. The right, however, in such a case, to resort to ordinary process does not imply the right to have recourse, for the purpose of collection, to summary proceedings of unusual harshness and rigor: *Succession of Irwin*, 33 La. Ann. 63, 75. It has even been held that a legal obligation to pay a tax raises an implied *assumpsit* by the person taxed: *Dugan v. Mayor*, 1 Gill & J. 499.

(g) *Special Remedy not Exclusive.*—The doctrine of the principal case that the remedy provided by the legislature for enforcing the payment of taxes is exclusive, and that no other means can be resorted to to coerce the payment is not supported by the authorities. This is the rule in Michigan: *City of Detroit v. Jepp*, 52 Mich. 458. And the contrary rule has been denounced as “against both reason and the decided weight of authority”: *Board of Education v. Old Dominion etc. Co.*, 18 W. Va. 441, per Greene, J. This case follows the rule laid down by Cooley in his work on Taxation, viz., that, if a remedy is given which does not embrace an action at law, a tax cannot be recovered by an action at law. Notwithstanding the principal case, the severe language of the learned judge, and the rule announced by the illustrious text-writer, we believe that both reason and authority do support the contrary view, and that a special remedy provided for the collection of taxes is cumulative only, and does not take away the right of action on the legal obligation to pay a claim created by law: *Mayor v. Howard*, 6 Har. & J. 383, 394; *City of Oakland v. Whipple*, 39 Cal. 113; *Chadwell v. Jones*, 1 Tenn. Ch. 493; *State v. Memphis etc. R. R. Co.*, 14 Lea, 56; *Howard v. Mayor*, 59 Tex. 76; *Ryan v. Gallatin County*, 14 Ill. 78; *Dunlap v. County of Gallatin*, 15 Ill. 7; *Town of Geneva v. Cole*, 61 Ill. 397; *City of Dubuque v. Illinois Cent. R. R. Co.*, 39 Iowa, 56; *City of Burlington v. Burlington etc. R. R. Co.*, 41 Iowa, 134; *New Orleans v. Day*, 29 La. Ann. 416; *Smith v. People*, 3 Ill. App. 380; *Greer v. City of Covington*, 83 Ky. 410; *Succession of Mercier*, 42 La. Ann. 1135.

These cases show that a tax may be enforced by an action at law, though a special legislative remedy exists therefor. In the case last cited the city of New Orleans claimed to be a privileged creditor of the succession of the deceased for unpaid city taxes for certain years, and it was held that it should not be first required to seize and sell real estate to enforce payment, but that it ought to be paid from the funds in the hands of the executor proposed for distribution. It may be observed, however, that, if the statute prescribes a plain, speedy, simple, and summary proceeding for the collection of taxes, there is no necessity for bringing an action to enforce them, and the court might, in such a case, be justified in holding that the particular mode prescribed should, by implication, exclude the right to resort to any other mode of enforcement, irrespective of any question affecting the right

of redemption: *Johnston v. Louisville*, 11 Bush, 527. Still, the question of jurisdiction to sue for a tax is unaffected. Jurisdiction in actions for the recovery of money depends alone upon the amount claimed, and cannot be in any way affected by the nature of the demand sued for. Hence a judgment for taxes is not void if the amount was within the court's jurisdiction: *Johnston v. Louisville*, 11 Bush, 527. If a suit for the collection of taxes, in addition to the summary mode of collection by distraint, is authorized by statute, a personal judgment bearing interest from its date may clearly be rendered against the taxpayer: *Greer v. City of Covington*, 83 Ky. 410.

2. IN CASES OF SPECIAL ASSESSMENTS.—(a) *The Distinction Between Special Assessments and Ordinary Taxation* has been accurately and forcibly pointed out as follows: "A local assessment can only be levied on land; it cannot, as a tax can, be made a personal liability of the taxpayer; it is an assessment on the thing supposed to be benefited. A tax is levied on the whole state, or a known political subdivision, as a county or a town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden, and must be collected at stated short intervals, for all time, and without it government cannot exist; a local assessment is exceptional both as to time and locality; it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion, and the accomplishment of the purpose. A tax is levied, collected, and administered by a public agency, elected by, and responsible to, the community upon which it is imposed; a local assessment is made by an authority *ab extra*. Yet it is like a tax in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among those upon whose property it is levied. It is unlike a tax, in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed, or else the courts will interfere to prevent its enforcement": *Town of Macon v. Patty*, 57 Miss. 378, 386; 34 Am. Rep. 451, per George, C. J.

(b) *Personal Liability for Assessments*.—A street assessment is always made a lien or charge against the adjoining lots when made at the expense of the property benefited. It is sometimes made a charge only against the property benefited; but in some states these local assessments are made a personal liability as well as a lien upon the property benefited. In fact it is customary not only to make the assessment a lien on the land, but also to make it a personal charge against the owner. As to the legality of doing this the courts are divided in opinion. Some of them hold that a special assessment is a personal charge against the owner, as well as a lien upon the property assessed, and that the amount thereof is enforceable by action, judgment, and execution against him: *People v. Mayor*, 4 N. Y. 419; 55 Am. Dec. 266; *Mayor v. Colgate*, 12 N. Y. 140; *Bennett v. City of Buffalo*, 17 N. Y. 383; *Stuart v. Palmer*, 74 N. Y. 183, 195; 30 Am. Rep. 289; *Litchfield v. McComber*, 42 Barb. 288; *Gilbert v. Havemeyer*, 2 Sand. 506; *Eschbach v. Pitts*, 6 Md. 71; *Clemens v. Mayor*, 16 Md. 208; *Wolff v. Mayor*, 49 Md. 446; *Dashiell v. Mayor*, 45 Md. 615; *Moale v. Mayor*, 61 Md. 224; *City of Burlington v. Quick*, 47 Iowa, 222. But the owner must have notice of the assessment in order

to make it a personal charge. A law authorizing him to be assessed without notice would be unconstitutional as depriving him of his property without due process of law: *Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289; *Bennett v. City of Buffalo*, 17 N. Y. 383. The rendering of a personal judgment, however, against the owner, when the tax is at the same time a charge on the land, is not in violation of the right to due process of law: *Davidson v. New Orleans*, 96 U. S. 97; and defective assessment proceedings are said not to be a bar to an action against the owner to enforce payment of his assessment: *Mayor v. Colgate*, 12 N. Y. 140.

Other cases hold that the city may take the whole property benefited, if necessary, for the payment of the tax, but cannot make the tax a personal charge against the owner, and which cannot therefore be enforced by a personal judgment and execution: See *Taylor v. Palmer*, 31 Cal. 241, 666; *Mix v. Ross*, 57 Ill. 121; *Craw v. Village of Tolono*, 96 Ill. 255; 36 Am. Rep. 143; *City of Seattle v. Yesler*, 1 Wash. (Ter.) 571; *City of Virginia v. Hall*, 96 Ill. 278; *Wolf v. City of Philadelphia*, 105 Pa. St. 25; *Town of Macon v. Patty*, 57 Miss. 378; 34 Am. Rep. 451.

So in Missouri. It was at first held in that state that a suit to recover a special tax was one *in personam*, and authorized a general judgment for the amount and interest, as well as a special judgment against the property: *City of St. Louis v. Clemens*, 36 Mo. 467; but now the doctrine of that state is that the property itself, and not the owner, is debtor to the city for the amount of the charge: *Neenan v. Smith*, 50 Mo. 525, overruling the last case cited; and that no general or personal judgment against the defendant can be rendered, but that it must be a special one against the property: *Carlin v. Oarender*, 56 Mo. 286; *City of St. Louis v. Bressler*, 56 Mo. 350; *City of Louisiana v. Miller*, 66 Mo. 467; *Strassheim v. Jerman*, 56 Mo. 104. There can be no personal judgment in such tax suits, even where there is personal service: *Milner v. Shipley*, 94 Mo. 106.

Our investigation of the authorities leads us to the conclusion that there can be no personal judgment to recover a special assessment. To use the language of Bliss, J., in *Neenan v. Smith*, 50 Mo. 525, 528, we express the reasons for our conclusion as follows: "There is a broad distinction, and one of universal recognition, between the foundation upon which is based the right of general taxation for governmental purposes and that which supports the rights of local assessments. The authority to impose either is referred to the taxing power; but the object of one, as giving the authority, widely differs from that of the other. All taxation is supposed to be for the benefit of the person taxed. That for raising a general revenue is imposed primarily for his protection as a member of society, both in his person and his property in general, and hence the amount assessed is against him, to be charged upon his property, and may be collected of him personally. But, on the other hand, local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer; the lots are increased in value, or better adapted to the uses of town lots, by the improvement. Upon no other ground will such partial taxation for a moment stand. Other property held by the owner is affected by this improvement precisely and only as is the property of all other members of the community, and there is no reason why it should be made to contribute that does not equally apply to that of all others. The sole object, then, of a local tax being to benefit local property, it should be a charge upon that property only, and not a general one upon the owner. The latter, indeed, is not what is under-

stood by a local or special assessment, but the very term would confine it to the property in the locality; for, if the owner be personally liable, it is not only a local assessment, but also a general one as against the owner. The reasonableness of this restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomaly—the monstrous injustice—of not only wholly absorbing the property supposed to be benefited and rendered more valuable by the improvement, but also of entailing upon the owner the loss of his other property. I greatly doubt whether the legislature has the power to authorize a general charge upon the owner of local property which may be assessed for its especial benefit, unless the owners of all taxable property within the municipality are equally charged. As to all other property not to be so specially benefited, he stands on the same footing with others; he has precisely the same interest, and should be subject to no greater burdens.”

Besides this, the courts, in at least three of the states, have pronounced a statute making the owner personally liable for a special assessment, unconstitutional: *Taylor v. Palmer*, 31 Cal. 241; *City of Virginia v. Hall*, 96 Ill. 278; *City of Clinton v. Henry County*, 115 Mo. 557; 37 Am. St. Rep. 415. *Contra: Gest v. City of Cincinnati*, 26 Ohio St. 275; *City of Burlington v. Quick*, 47 Iowa, 222.

CARSON v. STEVENS.

[40 NEBRASKA, 112.]

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—BURDEN OF PROOF.—

The rule that the party alleging fraud must prove it has no application in a suit between a wife and her husband's creditor, concerning property transferred to her by the husband after the debt was contracted. In such a case the wife must establish, by a preponderance of evidence, the *bona fides* of the transaction.

CONFLICTING AND MISLEADING INSTRUCTIONS are good ground for a reversal of judgment, though the correct rule is announced in one part of the charge.

Carson & Fifield and W. C. Sloan, for the appellant.

F. B. Donisthorpe, for the appellee.

112 NORVAL, C. J. This was an action of replevin brought by the defendant in error to recover possession of a general stock of merchandise taken by the plaintiff in error, as sheriff of Fillmore county, under several writs of attachments issued against Garrett Stevens, husband of defendant in error. The plaintiff below claimed title to the property by virtue of a bill of sale given to her by her husband. She having failed to give a replevin bond as required by law, the action proceeded as for conversion.

Two trials have been had, the first of which resulted in a verdict and judgment for the sheriff. Plaintiff below prosecuted a petition in error to this court, where, at the ¹¹³September term, 1890, the judgment was reversed and the cause remanded to the district court for a new trial: 30 Neb. 544. On the second trial a verdict was rendered for defendant in error for six hundred and eleven dollars and eleven cents, upon which judgment was rendered. The sheriff brings the case to this court on error.

It is undisputed that the stock of goods in controversy was owned by Garrett Stevens on and prior to January 15, 1889. On that day Stevens, being insolvent, conveyed by bill of sale all of his property to his wife, the defendant in error, in payment of an alleged indebtedness. Mrs. Stevens was aware, at the time of the transfer, that her husband was being pressed by his creditors for the payment of their claims. Shortly after the execution of the bill of sale the sheriff seized the goods by virtue of three writs of attachment in suits brought by the creditors of Garrett Stevens. Upon the last, as well as the former, trial, defendant in error introduced testimony tending to show that the property was transferred to her in payment of a pre-existing indebtedness of her husband. There was likewise evidence before the jury from which the inference could properly be drawn that the bill of sale was fraudulently made for the purpose of hindering and delaying the creditors of Garrett Stevens in the collection of their debts.

In the opinion on the former hearing we said: "Where a debtor transfers property to his wife, and such transfer is contested by the creditors of the husband, the presumption is against the *bona fides* of the transaction, and the law places the burden upon the wife to show that the sale was not made to defraud the creditors of the husband." In other words, she is required to prove by a preponderance of the evidence that the transfer was made in good faith and not with the intent of hindering, delaying, and defrauding the husband's creditors, where such transfer is made subsequent to the contracting of the indebtedness for which the attachments were sued out.

¹¹⁴ The principal ground upon which we are asked to reverse the case is that the instructions of the trial court upon the question of the burden of the proof are contradict-

ory and misleading. The third and fourth instructions given at the request of the plaintiff in error are as follows:

"3. The jury are instructed that transactions between husband and wife in relation to the sale or transfer of property from one to the other, whereby creditors are prevented from collecting their just dues, should be scrutinized very closely, and the *bona fides* of such transaction should be established satisfactorily by a preponderance of the evidence.

"4. The jury are instructed that, in a contest between the wife and the creditors of her husband in regard to property transferred by him to her, there is a presumption against her which she must overcome by affirmative proof; and prove by a preponderance of the evidence the *bona fides* of the sale."

The second and fourth instructions given by the court on its own motion read as follows:

"2. The defendant admits the taking of the property, but says that it was the property of Garrett Stevens, and the claim of plaintiff therein fraudulent, and that the defendant took the goods by virtue of certain writs of attachment against Garrett Stevens, which were set forth in defendant's answer herein, and that the transfer to plaintiff of the merchandise was made and received with the knowledge of the claim of the creditors and with intent to hinder, delay, and defraud the creditors of Garrett Stevens."

"4. It is a general rule of law that a party alleging a fact undertakes the burden of proving such fact by a preponderance of the evidence."

And at the request of the defendant in error the court gave this instruction, to the giving of which the plaintiff in error excepted:

"8. You are instructed that fraud is never presumed. 115 The burden is upon the defendant to establish the allegations by a preponderance of evidence in this case."

Generally the burden is upon the party alleging fraud to prove the same. But the rule is different in cases like the one at bar, where the transfer was made after the contracting of the indebtedness for which the attachments were issued. As was said by this court in the opinion in *First Nat. Bank v. Bartlett*, 8 Neb. 328: "Transactions between husband and wife in relation to the transfer of property from him to her, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and it must

be clearly established that such transactions were made in good faith: *Aultman v. Obermeyer*, 6 Neb. 264. The reason is that there is such a community of interest between husband and wife that such transfers are often resorted to for the purpose of withdrawing the debtor's property from the reach of his creditors, and preserving it for his own use. Therefore, in a contest between a wife and the creditors of her husband there is a presumption against her which she must overcome by affirmative proof."

In the case under consideration the sheriff was not required to establish that the property was transferred to Mrs. Stevens with an intent to defraud; but it devolved upon her to establish, by a preponderance of the evidence, the good faith of the transaction. The two instructions above quoted, which were given at the request of plaintiff in error, stated the law applicable to the evidence correctly, and the doctrine therein enunciated is in harmony with the previous decisions of this court upon the question under consideration: *First Nat. Bank v. Bartlett*, 8 Neb. 328; *Thompson v. Loenig*, 13 Neb. 386; *Stevens v. Carson*, 30 Neb. 544.

The trial court, in its fourth instruction, announced the general rule upon the question of the burden of proof. This instruction was not excepted to when read to the jury, ¹¹⁶ nor is the giving thereof now assigned for error, but it is urged that the plaintiff's eighth instruction and the defendant's third and fourth requests are contradictory. We think this contention is well founded, since the eighth instruction asked by defendant charged the jury, in effect, that the sheriff was required to prove the allegations of fraud in his answer by the preponderance of the evidence, while by the other two instructions referred to the jury were informed that the law raised a presumption that the transfer of the property to the wife was fraudulent, and that the burden was upon her to overcome this presumption by a preponderance of the evidence. The two rules laid down for the guidance of the jury were conflicting and misleading, and, therefore, were prejudicial to the rights of plaintiff in error: *Wasson v. Palmer*, 13 Neb. 376; *School District v. Foster*, 31 Neb. 501.

There are other errors assigned, such as the verdict is contrary to the evidence, and errors of law occurring during the trial, but they will not be considered, since the judgment must be reversed for the reasons already stated. The judg-

ment of the district court is reversed and the cause remanded for a new trial.

Reversed and remanded.

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—BURDEN OF PROOF. The burden of proof is upon the wife to show that she is a *bona fide* purchaser in a contest between herself and a creditor of the husband over a conveyance made by him to her: See notes to *Duggett etc. Co. v. Bulfer*, 31 Am. St. Rep. 406; *Trapnell v. Conklyn*, 38 Am. St. Rep. 44; *Brown v. Mitchell*, 11 Am. St. Rep. 758.

INSTRUCTIONS.—Error in giving an instruction which misstates the law is not cured by giving another instruction which correctly states it, because the court cannot say which instruction the jury will follow: *McOleneghan v. Omaha etc. R. R. Co.*, 25 Neb. 523; 13 Am. St. Rep. 508.

ENGLEBERT v. TROXELL.

[40 NEBRASKA, 195.]

INFANTS—CONTRACTS.—All contracts of an infant, except those for necessities, are voidable by him at his election within a reasonable time after he becomes of age.

INFANTS—CONTRACTS—RATIFICATION—DISAFFIRMANCE.—The validity of an infant's contract does not depend upon a ratification thereof by him after his minority ends. It is valid until he, by some act, clear and unmistakable in its character, and within a reasonable time, disaffirms it.

INFANTS—CONTRACTS—DISAFFIRMANCE—ACTION TO CANCEL DEED.—Plaintiff's suit to cancel a deed made by him when a minor, and on that ground is an unequivocal and sufficient disaffirmance of such contract.

INFANTS—CONTRACTS—DISAFFIRMANCE—REASONABLE TIME.—What is a reasonable time for an infant, after becoming of age, to disaffirm a contract made by him during his minority is a mixed question of law and fact, to be determined from the circumstances in each particular case.

INFANTS.—"NECESSARIES" FOR WHICH A MINOR MAY BIND HIMSELF is not a term which can be defined by a general rule applicable to all cases. It includes what a court or jury may think in each case suitable and proper in reference to the infant's condition and station in life.

INFANTS—NECESSARIES.—SERVICES PERFORMED BY THE GUARDIAN AD LITEM of an infant in defending a suit brought to foreclose a real estate mortgage executed by the infant's ancestor are not necessities.

INFANTS—DISAFFIRMANCE OF CONTRACT—RETURN OF CONSIDERATION.—One who seeks to disaffirm his contract made during infancy must return so much of the consideration as he has at the time of such election, but is not required to return any part of the consideration disposed of, or any equivalent therefor.

INFANTS—DISAFFIRMANCE OF CONTRACT—RETURN OF CONSIDERATION.—If an infant conveys his real estate for cash paid to his father, who buys a piano for the infant with the money, and the infant, on coming of age, though still having the piano, chooses to disaffirm the deed, he may do so, without either surrendering the piano or repaying the money.

INFANTS.—AN INFANT'S DEED TO HIS GUARDIAN AD LITEM in consideration of services rendered, or to be rendered, by the latter as such guardian, is voidable by the infant on arriving of age.

INFANTS.—AN ATTORNEY AT LAW ACTING AS THE GUARDIAN AD LITEM of an infant must look to the court alone for the amount of his compensation, which should be taxed as part of the costs in the proceeding, and collected as such. No other or greater amount than that allowed by the court can be collected.

George E. Pritchett and Switzler & McIntosh, for the appellants.

Charles Offutt and St. John & Stevenson, for the appellee.

200 RAGAN, C. On April 1, 1874, Mrs. Frances H. Englebert was the owner of lot 8 in Geise's addition to the city of Omaha. At that time she and her husband, J. Lee Englebert executed a mortgage on said lot to Max Meyer & Bro. to secure a note of three hundred and seventy-eight dollars and forty-eight cents, due July 1, 1874. Soon after that time Mrs. Englebert and her husband removed to Des Moines, Iowa, in which city Mrs. Englebert died on the 29th of December, 1875. She died intestate, leaving her husband and one child, the appellee herein, then a boy about seven years of age. November 1, 1881, Max Meyer & Bro. brought suit in the district court of Douglas county, against Mr. and Mrs. Englebert only, to foreclose the mortgage above mentioned, and obtained service upon them by publication, Max Meyer & Bro. being then ignorant of the fact of Mrs. Englebert's death.

December 17, 1881, George E. Pritchett, an attorney at law residing at Omaha, Nebraska, informed Mr. Englebert by letter of the pendency against him and his wife of Max Meyer & Bro's mortgage foreclosure suit, and requested to be authorized to appear in and defend the same. Various communications took place immediately afterward between Pritchett and Mr. Englebert, finally culminating in an agreement between them that Pritchett should defend the foreclosure suit for Englebert and his minor son, and receive as compensation for his services one-half of whatever of the lot he might succeed in saving from the lien of the Max Meyer & Bro. mortgage. In pursuance of this agreement, on the fourth day of August, 1885, Mr. Englebert and his minor son conveyed to Pritchett, subject to the Max Meyer & Bro. mortgage, an undivided one-half of the aforesaid lot. Pritchett seems to have succeeded in having the foreclosure suit,

as brought, continued from time to time, on one pretext or another, until August, 1884.

In August, 1885, Max Meyer & Bro. filed an amended ²⁰¹ petition in their foreclosure suit, making Francis Leon Englebert, the minor son of Mr. and Mrs. Englebert, a party defendant to the action. Pritchett filed an answer on behalf of Mr. Englebert to this amended petition, and, having been by the court appointed guardian *ad litem* for Francis Leon Englebert, also filed an answer in the action for him. These answers admitted the execution and delivery of the note and mortgage described in the foreclosure suit, alleged that the legal title to the property was at the time of the execution of the mortgage in Mrs. Englebert, her death, and that the legal title to the real estate had descended to, and was then vested in, the minor son, Francis Leon Englebert; that that the only interest that Mr. Englebert had in the property mortgaged was a life estate as tenant by the courtesy of his deceased wife; and that the interest of the minor, Francis Leon Englebert, in the real estate could not be sold to satisfy the mortgage debt, because the action as against him was not brought within ten years from the date of the maturity of the note which the mortgage was given to secure. The court rendered a decree, and ordered the life estate only of Mr. Englebert sold to satisfy the amount found due on the mortgage. This life estate was sold under a decree, the property purchased by one of the plaintiffs in the foreclosure suit, and the sale confirmed; a deed was ordered, but never made to the purchaser.

On the sixth day of January, 1886, on the joint application of Mr. Englebert and his minor son, Mr. Pritchett was appointed guardian of the minor son by the county court of Douglas county accepted the trust, and qualified therefor by taking the oath and giving bond as required by statute.

On June 1, 1886, in pursuance of an agreement between Mr. Pritchett and Mr. Englebert, his son, then being about eighteen years of age, and in consideration of two hundred and forty dollars in cash then paid by Pritchett to Englebert, conveyed to Pritchett the undivided one-half of the lot.

²⁰² On the twenty-second day of December, 1888, J. Lee Englebert died. On the 11th of October, 1889, Francis Leon Englebert became of age, and one month and three days thereafter, to wit, on the fourteenth day of November, 1889, brought this suit in equity in the district court of Douglas county,

against the said George E. Pritchett and others who were claiming to be owners of some part of said lot under conveyances from Pritchett, to cancel and set aside the deeds hereinbefore mentioned made by himself and father to Pritchett, alleging that at the time he executed said deeds he was seised in fee simple of the property and was a minor.

The district court rendered a decree canceling and setting aside said deeds and awarding the plaintiff a writ of possession for said real estate. The case is before us on appeal.

The reported decisions, especially the older ones, abound with grave, learned, and lengthy discussions of the question as to whether the contracts of an infant are void or voidable; and there are respectable authorities which hold that certain contracts of an infant, made under certain circumstances, are absolutely void; but we think that the better rule, and the one supported by the weight of authority, is that all contracts of an infant, except those for necessities, are voidable by the infant at his election within a reasonable time after he becomes of age. In *Tunison v. Chamblin*, 88 Ill. 378, the rule is thus stated: "Deeds made by a minor are not void, but only voidable. Their validity does not depend upon a ratification after the minor attains his majority, but to avoid them he must by some act, clear and unmistakable in its character, disaffirm their validity": See, also, *Bonner v. Illinois Land etc. Co.*, 75 Ill. 315; *Hyer v. Hyatt*, 3 Cranch C. C. 276; *Kendall v. Lawrence*, 22 Pick. 540; *Dixon v. Merritt*, 21 Minn. 196; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Irvine v. Irvine*, 9 Wall. 617; Pomeroy's Equity Jurisprudence, 2d ed., sec. 945. Such is ²⁰³ also the doctrine of this court as stated in *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54, where it is said: "Contracts of an infant, other than for necessities, are voidable only, and upon coming of age he may affirm or avoid in his discretion." The deeds made by the appellee in this case to Pritchett were voidable and not void. The appellee, within less than two months after his becoming of age, instituted this suit for the purpose of canceling the deeds made to Pritchett. This was, on the part of the appellee, an unequivocal and sufficient disaffirmance on his part of the contracts made: *Tunison v. Chamblin*, 88 Ill. 378; *Sims v. Everhardt*, 102 U. S. 300.

Was the disaffirmance of these deeds by appellee made within a reasonable time? As to what is a reasonable time for an infant after becoming of age to disaffirm contracts

made during his minority is a mixed question of law and fact to be determined from the circumstances in each particular case. In *Ward v. Lavery*, 19 Neb. 429, this court said: "A minor who has conveyed his real estate must disaffirm the deed within a reasonable time after becoming of age or be barred of that right." In that case the disaffirmance was not made until more than three years after the minor became of age, and the court held that the disaffirmance under the facts in the case was not made within a reasonable time. In *O'Brien v. Gaslin*, 20 Neb. 347, this court, adhering to the rule announced in *Ward v. Lavery*, 19 Neb. 429, held that a disaffirmance made by a party fourteen years after he became of age was not made within a reasonable time. In *Johnson v. Storie*, 32 Neb. 610, an infant who had signed a note as surety disaffirmed the same a year and a half after he became of age, and it was held that the disaffirmance was made within a reasonable time. There are some eminent authorities which hold that an infant may disaffirm a deed which he has made to his real estate during his minority at any time after he becomes of age before he would be barred by the statute of limitations from bringing ³⁰⁴ an action in ejectment for the real estate; but this is not the doctrine of this court. It is now firmly settled here that an infant, in order to avoid a contract made during his minority, must disaffirm the same within a reasonable time after his minority ends. There can be no doubt, in view of the authorities quoted above, but that the appellee disaffirmed within a reasonable time after he became of age the deeds made to Pritchett.

It is insisted by the appellants that the first deed made by appellee to Pritchett was voidable only, and that the services performed by Pritchett in the foreclosure suit of Max Meyer & Bro. for the appellee were necessities, and that therefore the appellee cannot avoid said first deed. Were the services performed by Pritchett for the appellee in the foreclosure suit "necessaries" within the meaning of that term? As to what are necessities for an infant cannot be defined by any general rule applicable to all cases; it is a mixed question of law and fact to be determined in each case from the particular facts, circumstances, and surroundings in that case. In *Shelton v. Pendleton*, 18 Conn. 417, a wife, without her husband's consent, employed an attorney to prosecute a suit for divorce in her favor against her husband for a legal and suf-

ficient cause. The attorney performed the services, and the decree of divorce was granted. The attorney then sued both the husband and wife for his fees. The court held that the services rendered were not necessities, and that the husband was not liable therefor. The court said: "By the law the defendant is liable only for necessities which the plaintiffs have provided for his wife. . . . The common law defines 'necessaries' to consist only of necessary food, drink, clothing, washing, physic, instruction, and a competent place of residence." In *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151, a female infant was seduced under a promise of marriage. Her seducer refused to marry her and she was left in a state of destitution. At her request an attorney brought ²⁰⁵ suit against the seducer for a breach of promise of marriage. The suit was settled by the intermarriage of the plaintiff and defendant. The attorney then sued both the husband and the wife for his services. The court held that the services rendered by the attorney, under the circumstances, were 'necessaries' within the meaning of that term. The court said: "Can the plaintiff's charges for prosecuting that action be considered as necessities under the circumstances? The rule usually stated in the text-books confines the term 'necessaries,' for which a minor may bind himself, to suitable food, shelter, clothing, washing, medicine, medical attendance, and education. It is admitted that it depends entirely upon what a court or jury may think in each case suitable and proper in reference to the infant's condition and station in life. . . . The personal security of the wife, then, is legally a necessary, and the expense of securing it is a proper charge against the husband. . . . If we look at the prosecution of the suit which the infant commenced as her only mode under her peculiar circumstances of procuring the means of living, it comes within the principle allowing her to contract for necessities. . . . It was not the case of merely prosecuting an infant's right to property or for the recovery of an ordinary debt. In such cases there is, or ought to be, a guardian to protect the infant's rights. There was none here, and it does not appear that there were any practicable means of procuring one to be appointed. . . . It appears to us, therefore, that while the court recognized the rule that the ordinary fees of an attorney for the prosecution of an infant's rights to property could not generally be said to be necessities, it yet further correctly informed them in substance

that such services, where requisite for the personal relief, protection, and support of the infant, might be lawfully contracted for by the infant, and that he would be liable to pay for the same." In *Wallis v. Bardwell*, 126 Mass. 366, it was held: "A ward is not liable for repairs ²⁰⁰ put upon his dwelling-house by a person employed by the guardian to make them, even after the death of the guardian; and evidence that the repairs were necessary is immaterial." In *Tupper v. Cadwell*, 12 Met. 559, 46 Am. Dec. 704, it was held: "An infant is not liable for the expense of repairing his dwelling-house on a contract made by him therefor, although such repairs were necessary for the prevention of immediate and serious injury to the house." The court said: "An infant may make a valid contract for necessities, and the matter of doubt in the present case is what expenditures are embraced in the term 'necessaries.' . . . It has sometimes been contended that it was enough to charge the party, though a minor, that the contract was one plainly beneficial to him in a pecuniary point of view. That proposition is by no means true, if by it it be intended to sanction an inquiry in each particular case, whether the expenditure or articles contracted for were beneficial to the pecuniary interests of the minor. The expenditures are to be limited to cases where, from their very nature, expenditures for such purposes would be beneficial; or, in other words, they must belong to a class of expenditures which are in law termed beneficial to the infant. What subjects of expenditure are included in this class is a matter of law to be decided by the court. The further inquiry may often arise whether expenditures, though embraced in this class, were necessary and proper in the particular case, and this may present a question of fact. It is therefore a preliminary question to be settled whether the alleged liability arises from expenditures for what the law deems 'necessaries,' and unless that be shown it is not competent to introduce evidence to show that in a pecuniary point of view the expenditure was beneficial to the minor": See, also, *Price v. Sanders*, 60 Ind. 310; *Mathes v. Dobschuetz*, 72 Ill. 438; *Bloomer v. Nolan*, 36 Neb. 51; 38 Am. St. Rep. 690. In *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574, it was held that money furnished an infant to enable him to acquire a professional education ²⁰⁷ was not a necessary. In *Decell v. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449, it was held that money furnished an

infant to enable him to carry on a plantation was not a necessary. In *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160, it was held that the services rendered by an attorney in defending an infant in a bastardy proceeding was a necessary. In *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435, it was held that where an infant had no guardian, and the services rendered by an attorney were beneficial to the infant's estate, that he was liable for such services. In *Assignees of Hull v. Connolly*, 3 McCord, 6, 15 Am. Dec. 612, and in *Kline v. L'Amoureux*, 2 Paige, 419, 22 Am. Dec. 652, it was held that if an infant was living with his parents or guardian, and properly maintained by them, his contract even for necessities was not binding. In the case at bar, when the appellee made the first deed to Pritchett, in consideration that he would defend the Max Meyer & Bro. mortgage foreclosure suit, he was living with his father, his natural guardian; so that, if we held that the services rendered by Pritchett in the foreclosure suit were necessities, still the appellee would not be bound to pay for the services if this was a suit by Pritchett on the contract made for that purpose. In the light of the authorities quoted above upon this subject, we are clearly of the opinion that the services rendered by Mr. Pritchett in the foreclosure suit cannot be considered necessities under the facts of this case.

Another contention of the appellants is that the appellee has not restored the consideration he received from Pritchett for the execution of the two deeds which he seeks to cancel by this suit, and therefore he cannot maintain this action. There are many authorities which hold that it is not necessary, to enable an infant, on coming of age, to disaffirm a contract made during his minority, to restore or return, or offer to restore or return, as a condition precedent to his right to disaffirm such contract, the consideration which he received therefor. But the rule of this court is otherwise. In *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54, the rule is ²⁰⁸ thus stated: "If an infant purchase personal property and give his note therefor he cannot, upon arriving at the age of twenty-one years, retain the property and plead infancy as a defense to the note." This is a somewhat loose statement of the rule. The rule is concisely and correctly stated by Post, J., in *Bloomer v. Nolan*, 36 Neb. 51, 38 Am. St. Rep. 690, in this language: "One who seeks to disaffirm a contract on the ground that he was an infant at the time of its execution is

required to return so much of the consideration received by him as remains in his possession at the time of such election; but is not required to return an equivalent for such part thereof as may have been disposed of by him during his minority." That is to say, the infant, on coming of age and electing to disaffirm a contract made by him during his minority, must restore or return so much of the consideration received by him in consideration of executing the contract as he then has in specie in his possession. The language of the authorities is that he must return or restore whatever of the consideration he then has; not that he is to pay to the party with whom he made the contract an equivalent or that which he received from said party. In *Reynolds v. McCurry*, 100 Ill. 356, the rule is thus stated: "It is the general rule that where the consideration of a conveyance by an infant has been expended so that he is not in a condition to restore it, he may nevertheless avoid the conveyance. It is only when he still has the consideration that he will be compelled to return it": See, also, *Miller v. Smith*, 26 Minn. 248, 37 Am. Rep. 407. In *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117, the rule is stated in this language: "If money paid to a minor as the consideration for his conveyance of real estate has been wasted or spent by him during his minority, payment or tender of the amount is not necessary to enable him to avoid the conveyance." The Iowa code provides that a minor is bound by his contract unless he disaffirms it and restores to the other party all money or property received by him by virtue of his contract and remaining ²⁰⁹ within his control. Construing this section of the code, the supreme court of Iowa, in *Hawes v. Burlington etc. Ry. Co.*, 64 Iowa, 315, held that where a minor had disaffirmed a contract he was only required to return the identical money or property received by him for the execution of such contract remaining in his possession at the time of his disaffirmance thereof. The court said: "It is not shown or pretended that he had remaining under his control at any time after attaining his majority any money or property received by him by virtue of the contract, and it is only such money or property as may thus remain that he is bound to restore."

So far as the consideration for the first deed made by the appellee to Pritchett is concerned, the only consideration which it is claimed appellee received for such deed was the services rendered by Mr. Pritchett in defending the Max

Meyer & Bro. foreclosure suit. There are several things to be said of these services. In the first place, but for the voluntary intervention of Mr. Pritchett in that suit we are led to believe, from the record before us, that Max Meyer & Bro. would have proceeded to decree of foreclosure against the father and mother of appellee only, notwithstanding that the appellee's mother was dead at the time the foreclosure suit was brought, and the title to the real estate had vested in the appellee. Such a decree would not have been binding upon the appellee and would not have deprived him of the right at least to redeem his property from such decree, if such decree would have in any manner interfered with appellee's title.

Again, at the time Mr. Pritchett rendered these services he was an officer of the court in which the foreclosure suit was pending, and had been by the court appointed guardian *ad litem* for the appellee; he had accepted this appointment and was acting for the appellee. Section 14, chapter 7, of the Compiled Statutes of 1893, then and now in force, provides: "It shall be the duty of every attorney to act as ²¹⁰ the guardian of any infant defendant in any suit pending against him, when appointed for that purpose by order of the court; he shall prepare himself to make the proper defense, to guard the rights of said defendant, and shall be entitled to such compensation as the court shall deem reasonable." In view of this statute, and in view of the circumstances under which Mr. Pritchett rendered the services for the appellee in the foreclosure suit, we are constrained to say that if such services had been necessities, nevertheless the appellee's contract, by which he paid Pritchett one-half the real estate in litigation in consideration of the services, would still have been voidable at the suit of the appellee. It was the duty of Pritchett to render the services he did. This was a duty imposed upon him by law and resulting from his profession. For performing the duties of a guardian *ad litem* an attorney must look, and look only, for the amount of his compensation to the court, and the compensation allowed the guardian should be taxed as costs in the proceedings and as such collected. Perhaps it might be filed as a claim against the minor's estate, but no other different or greater amount can be collected than that allowed by the court. Whatever may be said of the services rendered by Mr. Pritchett in the foreclosure suit for the ap-

pellee, such services, of course, cannot be returned in kind.

The consideration for the second deed was two hundred and forty dollars in money paid by Pritchett to appellee's father. It is not claimed or pretended that this money, or any part of it, ever came into the possession of the appellee. It appears that the appellee's father bought a piano with this money and gave it to the appellee, and that he still has it. But the appellee was under no legal obligations to offer, or tender, or surrender this piano to Pritchett as a condition precedent to his right to disaffirm the deed; nor was the appellee under any legal obligation, as a condition precedent to his right to disaffirm the deed, to repay Pritchett ²¹¹ the money which he had paid appellee's father in consideration of the execution of the deed. At the time appellee disaffirmed these deeds and brought this suit there was in his possession no part of the consideration parted with by Pritchett at the time appellee executed the deeds.

The final contention of the appellants is that the appellee, having executed the deeds, he is in equity estopped from disaffirming them as against innocent purchasers. This is a remarkable argument, in view of the record in this case. Not one of the appellants is an innocent purchaser of any part of this property in any sense whatsoever. There is in all this record not one word of evidence that the appellee, by any act or omission of his, either before or after his coming of age, induced either of the appellants to purchase any of the property in this suit. Certainly the appellants, as purchasers of this property, were bound by such notice as the public records of Douglas county afforded of the fact of the infancy of the appellee. Had appellants, intending to purchase this property, exercised ordinary care, and looked into the records of Douglas county as to the title of this property, they would have found the title to the same in appellee's mother in 1874. They would have found the record of the foreclosure suit of Max Meyer & Bro. They would have seen that the decree in that case found that the title of this property had passed to appellee; that he was at that time an infant. They would have found the first deed from appellee to Pritchett antedating the decree in the foreclosure suit. They would have found of record in the office of the probate court of Douglas county the very day and hour of appellee's birth; the finding by that court that appellee was a minor in

1888, giving his age; the appointment by that court on that date of Pritchett as his guardian. Certainly these records were sufficient to have protected the appellants had they looked for them. If they did not examine the records, and chose to rely upon the ability of their grantors to make good the title for ²¹² them, they have no one of whom to complain. Certainly they are in no position to invoke the aid of this court in this case to protect them as innocent purchasers; and besides there is no such thing as an innocent purchaser of a minor's property. The decree of the district court is affirmed.

INFANTS—RIGHT TO DISAFFIRM CONTRACTS.—An infant's deed does not bind him if, upon coming of age, he decides to disaffirm it. It is not void, but voidable: *Dolph v. Hand*, 156 Pa. St. 91; 36 Am. St. Rep. 25, and note. A contract for the purchase of land by an infant may be avoided and disaffirmed by him on arriving at legal age by any act of positive dissent: *McCarty v. Woodstock Iron Co.*, 92 Ala. 463. This question is discussed generally in the extended note to *Craig v. Van Bebber*, 18 Am. St. Rep. 574.

INFANTS' CONTRACTS—NECESSITY FOR DISAFFIRMING.—In order that an infant may avoid his deed he must disaffirm it within a reasonable time. What is such reasonable time is a question of fact: *Searcy v. Hunter*, 81 Tex. 644; 26 Am. St. Rep. 837, and note to the same effect: *Dolph v. Hand*, 156 Pa. St. 91; 36 Am. St. Rep. 25; *Johnson v. Storie*, 32 Neb. 610.

INFANTS—NECESSARIES.—TEST OF, AND WHETHER INCLUDE ATTORNEY'S FEES: See *Searcy v. Hunter*, 81 Tex. 644; 26 Am. St. Rep. 837, and note; *Askey v. Williams*, 74 Tex. 294, and the extended note to *Craig v. Van Bebber*, 18 Am. St. Rep. 650.

INFANTS—DISAFFIRMANCE OF CONTRACT—RETURN OF CONSIDERATION.—One seeking to avoid a contract on the ground of infancy will be required to make restitution of that part of the consideration still in his hands when he attains his majority, or when he elects to disaffirm: *Bloomer v. Nolan*, 36 Neb. 51; 38 Am. St. Rep. 690, and note. If an infant seeks to escape liability on his contracts he cannot repudiate the same and retain as his own the fruits of it still in his possession: *Evans v. Morgan*, 69 Miss. 328. See, also, the note to *Morse v. Ely*, 26 Am. St. Rep. 264, and the extended note to *Craig v. Van Bebber*, 18 Am. St. Rep. 687.

CAPPS v. HASTINGS PROSPECTING COMPANY.

[40 NEBRASKA, 470.]

CORPORATIONS—SUBSCRIPTION FOR STOCK.—A writing in substance as follows: "For the purpose of organizing a corporation to bore for gas, we, the undersigned, agree to subscribe and pay for the amount of stock set opposite our names within thirty days from the organization of said corporation," and signed, is a promise to take and pay for the stock of a corporation *de jure*, not of a corporation *de facto*, thereafter to be organized.

CORPORATIONS.—A CORPORATION DE JURE is one whose right to exercise a corporate function is invulnerable if assailed by the state in a *quo warranto* proceeding.

CORPORATIONS—FAILURE TO FILE ARTICLES OF INCORPORATION—EFFECT OF.—A corporation which has failed to file its articles of incorporation with the county clerk of the county, fixed by its articles of association as its principal place of business, has no valid existence as a *de jure* corporation.

CORPORATIONS—SUBSCRIPTIONS FOR STOCK—DISTINCTION.—There is a distinction between the liability of parties for subscriptions to a corporation, or an association which assumes to be and is acting as a corporation, and the liability for subscriptions made by parties for the purpose of organizing a corporation from among the subscribers.

CORPORATIONS — SUBSCRIPTION—ESTOPPEL.—A subscription for stock to preliminary articles of association not purporting to be a contract with an existing corporation does not estop the subscriber from afterward denying the legal existence of the corporation in a suit upon the subscription.

Capps, McCreary & Stevens, for the appellants.

Batty, Casto & Dungan, for the appellee.

472 RAGAN, C. The Hastings Prospecting Company sued Lucius J. Capps and Willis P. McCreary, copartners doing business under the name, firm, and style of Capps & McCreary, in the district court of Adams county, on a subscription or writing obligatory signed by them, in words and figures as follows: "For the purpose of organizing a corporation with a capital stock of fifteen thousand dollars to bore for gas, oil, or coal, at or near the city of Hastings, Adams county, Nebraska, and to buy or lease the land to experiment thereon for such purposes, and to buy, lease, or hire the necessary machinery and labor for such purposes, we, the undersigned, agree to subscribe and pay for the amount of stock set opposite our names; said stock to be paid for in the manner following, to wit: Ten per cent within thirty days from the organization of said corporation, and the balance at the call of the directors; *provided*, that said directors shall

not have power to call for more than ten per cent of said stock at any one time; and *provided further*, that payment shall not be called for oftener than once a month. Names, Capps & McCreary; number of shares, ten shares; dollars, one hundred dollars." The case was tried to the court, a jury being waived, resulting in a finding and judgment in favor of the prospecting company, and Capps and McCreary bring the case here for review.

The only errors assigned are that the finding and judgment of the court are contrary to the evidence and the law. The undisputed evidence in the case is that the plaintiffs in error and a number of other citizens signed the subscription paper quoted above; that, after the fifteen thousand dollars of stock had ⁴⁷⁸ been subscribed, the subscribers, or some of them, met and elected a board of directors, adopted articles of incorporation, and filed a copy of the same in the office of the secretary of state and the original in the office of the register of deeds of Adams county, the county in which the principal place of business was fixed by the articles of association.

This incorporation, or attempted incorporation, occurred on the fifteenth day of April, 1889. The articles of incorporation were never filed in the office of the county clerk of Adams county. We have here, then, the questions: 1. Whether the prospecting company failed to become, as it attempted, a corporation *de jure*, by neglecting to file in the office of the county clerk its articles of incorporation; 2. And if it did, whether such default or failure on the part of the prospecting company is available as a defense to the plaintiffs in error? The first inquiry which presents itself is as to the nature of the agreement which the plaintiffs in error signed. What did they promise to do? We think a fair construction of the writing signed by them amounts to this: That they agreed to accept and pay for ten shares of the capital stock of the corporation the subscribers to the enterprise of boring for gas should organize, such payment to be made within thirty days after such corporation should be organized. The next inquiry is, What is meant by the expression, "when the corporation shall be organized"? It must be remembered that the plaintiffs in error agreed to become stockholders in the corporation that should be formed, and a fair construction of this promise is that they meant to become stockholders in a corporation *de jure*, and not a corporation *de facto*. A *de jure* corporation

is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in *quo warranto* proceedings. The plaintiffs in error might have been willing to invest a part of their capital towards a public enterprise, and take their chances of the investment being remunerative, if no further liability would attach ⁴⁷⁴ to them than that of stockholders in a *de jure* corporation, when they would not have embarked the same money for the same purpose in a partnership or a *de facto* corporation, where they would assume liabilities greater than those of stockholders in a *de jure* corporation. We hold, then, that by the subscription signed by the plaintiffs in error they promised to take and pay for ten shares of the capital stock of such *de jure* corporation as might be formed for the purpose for which the subscription was made.

Is the Hastings Prospecting Company, or has it ever been, a *de jure* corporation? It is admitted that it did not file in the office of the county clerk of Adams county, that being the county in which its articles of incorporation fixed its principal place of business, its articles of incorporation. Did this default prevent the Hastings Prospecting Company from becoming a corporation *de jure*? The authorities are not entirely in harmony on this question, but the weight of authority is, that where the statute requires the articles of incorporation to be filed with some public officer before the commencement by the proposed corporation of the business for which it is organized, such filing is a condition precedent to the right of such corporation to perform any corporate function; consequently, until a compliance with the statute, the corporation has no valid existence as a *de jure* corporation. Morawetz on Private Corporations, section 27, says: "A substantial compliance with all the terms of a general incorporation law is a prerequisite of the right of forming a corporation under it. Thus, where it is provided that a certificate or articles of association, setting forth the purposes of the corporation about to be formed, the amount of its capital, and other details, shall be filed with some public officer, a performance of this requirement is essential; and until it has been performed the association will have no right whatever to assume corporate franchises." Cook on Stock and Stockholders, section ⁴⁷⁵ 231, speaking to this same subject, says: "Occasionally, however, it happens that this certificate is not fully made out, as required by the statute, or is not filed, or some other

step prescribed by law is not complied with. The corporation is then not duly incorporated; and the state, by *quo warranto*, may oust it from its user of corporate franchises." In *Doyle v. Mizner*, 42 Mich. 332, it was ruled: "All private corporations must be organized under general laws, and can be valid only when strictly conforming to all the conditions imposed on their completion." The court says: "The incorporation was sought to be shown by asking Doyle, on cross-examination, concerning the signing of a paper purporting to be articles of incorporation which had been filed in the Detroit city clerk's office April 6, 1875. This paper was not acknowledged, and was not filed in the county clerk's office. . . . The statute concerning manufacturing corporations expressly requires that the articles shall be 'acknowledged before some person authorized by the laws of this state to take acknowledgments of deeds,' . . . that, before any such corporation shall commence business, the articles should be filed with the secretary of state and county clerk"; and the court held, that, by reason of the failure to acknowledge and file in the office of the county clerk the articles of incorporation, the association did not become a corporation *de jure*. To the same effect are *Stowe v. Flagg*, 72 Ill. 397; *Bigelow v. Gregory*, 73 Ill. 197; *Ulley v. Union Tool Co.*, 11 Gray, 139; *Unity Ins. Co. v. Cram*, 43 N. H. 636; *Childs v. Smith*, 46 N. Y. 34; *Harris v. McGregor*, 29 Cal. 125.

Section 126, chapter 16, of the Compiled Statutes of 1893, provides: "Every corporation, previous to the commencement of any business except its own organization, when the same is not formed by legislative enactment, must adopt articles of incorporation, and have them recorded in the office of the county clerk of the county . . . in which the ⁴⁷⁶ business is to be transacted." . . . Section 132 of said chapter provides: "Any corporation formed without legislative enactment may commence business as soon as its articles of incorporation are filed by the county clerks of the counties as required by this subdivision, and shall be valid if a copy of its articles be filed in the office of the secretary of state, and the notice required be published within four months from the time of filing such articles in the clerk's office." These two sections of the statute, read together, leave little room for doubt that the filing of the articles of incorporation in the office of the county clerk is one of the things required to make the corporation one *de jure*. To organize a corporation there must be

subscribers to the stock, a meeting of said subscribers, or some of them, the adoption of articles of association for the government of the proposed corporation, and such articles must be filed in the office of the county clerk of the county in which is fixed the corporation's principal place of business. These sections of the statute quoted above were construed by this court in *Abbott v. Omaha Smelting etc. Co.*, 4 Neb. 416, and it was there said: "In this state the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise. The law and the articles so filed, taken together, are considered in the nature of a grant from the state, and constitute the charter of the company." A corporate franchise is a privilege, a power, a right. It is a very different thing from the performance of any step necessary to the organization. In *Indianapolis Furnace etc. Co. v. Herkimer*, 46 Ind. 142, the question we are considering arose and was decided by the supreme court of Indiana, under a statute substantially like the one we have quoted above, and the court said: "The signing of articles of association by parties proposing to form a manufacturing corporation does not create such corporation. The subscribers must also make, sign, and acknowledge the certificate of ⁴⁷⁷ incorporation prescribed [by the statute], and must file the same in the recorder's office of the proper county." We think, therefore, that the Hastings Prospecting Company, the name of the corporation attempted to be organized by the subscribers who signed the subscription on which the plaintiffs in error are sued, is not, and has never been, a corporation *de jure*.

2. Is that fact available to the plaintiffs in error as a defense to this suit? It is to be borne in mind that the plaintiffs in error did not subscribe for the stock of any corporation, either *de facto* or *de jure*, then in existence; and there is a distinction as to the liability of parties for subscriptions to a corporation, or an association which assumes to be and is acting as a corporation, and the liability for subscriptions made by parties for the purpose of organizing a corporation from among the subscribers. If the subscription made by Capps & McCreary had been made to the Hastings Prospecting Company when it was acting as a corporation, when it was exercising the functions of a corporation, when it was claiming to be a corporation, and had their agreement been to pay such corporation certain sums of money for cer-

tain shares of its stock, it seems that they would then be estopped from setting up as a defense that the prospecting company was not a corporation *de jure*: Cook on Stock and Stockholders, sec. 186, and cases cited. Morawetz on Private Corporations, section 67, thus lays down the rule in such cases: "Every subscription [to the stock of a corporation to be organized] by implication refers to and incorporates the terms of the charter or general law under which the corporation is to be formed; and every subscriber agrees to become associated with the others only upon condition that the formalities prescribed by the charter shall be observed in making the mutual contract. Thus, if certain preliminaries, such as the filing of a certificate, are required to be performed after the articles of association ⁴⁷⁸ have been subscribed, but before the corporation shall be in existence, the contract of membership does not go into effect until these formalities are complied with, and a subscriber to the articles cannot until then be made to contribute the amount of his subscription." In *Rikhoff v. Brown's Rotary etc. Machine Co.*, 68 Ind. 388, it was held: "A subscription of stock to preliminary articles of association, not purporting to be a contract with an existing corporation, does not estop the subscriber to afterward deny the existence of the corporation in a suit upon the subscription": See, also, *Indianapolis Furnace etc. Co. v. Herkimer*, 46 Ind. 142, where it is said: "Until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped to deny the existence of the corporation": See, also, *Dorris v. Sweeney*, 60 N. Y. 463. We think these authorities are decisive of the case under consideration. The rule they lay down is sound law, good sense, and exact justice.

If the plaintiffs in error are to pay for the stock subscribed it of course follows that they become entitled to the stock. This would make them stockholders in a *de facto* corporation, and liable as copartners, whereas their contract was to become liable as stockholders. The plaintiffs in error have not broken their promise. The judgment of the district court is reversed.

SUBSCRIPTION FOR STOCK.—GENERAL FORM OF, AND WHEN VALID: See note to *Parker v. Thomas*, 81 Am. Dec. 395; *Nulton v. Clayton*, 54 Iowa, 425; 37 Am. St. Rep. 213; *Marysville etc. Power Co. v. Johnson*, 93 Cal. 538; 27 Am. St. Rep. 215.

CORPORATION DE FACTO, WHAT IS: *Allen v. Long*, 80 Tex. 261; 26 Am. St. Rep. 735, and note; *Finnegan v. Noerenberg*, 52 Minn. 239; 38 Am. St. Rep. 552, and note.

CORPORATIONS.—IF THERE IS NO CORPORATION DE JURE there can be no corporation *de facto*, unless the alleged corporation has at least attempted to do some corporate act or to exercise some corporate power: *Martin v. Deets*, 102 Cal. 55; 41 Am. St. Rep. 151.

CORPORATIONS—FAILURE TO FILE ARTICLES.—EFFECT OF: *Martin v. Deets*, 102 Cal. 55; 41 Am. St. Rep. 151, and note.

SUBSCRIPTIONS TO CORPORATE STOCKS.—DISTINCTION BETWEEN SUBSCRIPTIONS PROPER AND OFFERS AND AGREEMENT TO SUBSCRIBE: See monographic note to *Parker v. Thomas*, 81 Am. Dec. 392–402. The distinction between stock subscriptions prior and subsequent to the organization of an incorporated company is clearly recognized in Maryland: *Taggart v. Western Maryland R. R. Co.*, 24 Md. 563; 89 Am. Dec. 760, and note; *Hudson Real Estate Co. v. Tower*, 156 Mass. 82; 32 Am. St. Rep. 434, and note.

CORPORATIONS—SUBSCRIPTIONS—ESTOPPEL.—A subscription for the stock of a contemplated corporation is binding after the corporation becomes legally organized: *Richelieu Hotel Co. v. International etc. Co.*, 140 Ill. 248; 33 Am. St. Rep. 234, and note; *Hudson Real Estate Co. v. Tower*, 156 Mass. 82; 32 Am. St. Rep. 434, and note; but, until the statutory requirements to organize a corporation have been complied with, a subscriber to the articles of association is not estopped from denying the existence of the corporation: See note to *Parker v. Thomas*, 81 Am. Dec. 402. The mere filing of a complaint in which a company that has failed to file its articles within the time prescribed by statute is averred to be a corporation does not estop all the world, except the state, from denying the existence of such a corporation. The averment of the existence of a *de facto* corporation is as issuable as an averment of the existence of a corporation *de jure*: *Martin v. Deets*, 102 Cal. 55; 41 Am. St. Rep. 151.

KIRKWOOD v. FIRST NATIONAL BANK OF HASTINGS.

[40 NEBRASKA, 484.]

ACTIONS—LEGAL AND EQUITABLE JURISDICTION—JUDGMENT.—The district courts are courts of general law and equity jurisdiction, in which formal distinctions between law and equity have been abolished, and they have power to administer relief according to the nature of the case, without regard to forms of action. Hence, if to an action seeking legal relief there is an answer praying for equitable relief, and a trial by jury is waived, there can be no valid objection to a judgment granting equitable relief upon the ground that the action was one at law.

LOST INSTRUMENTS—INDEMNITY.—If an instrument negotiable by delivery is lost before maturity, a bond of indemnity should be required as a condition precedent to recovery thereon; but if it is shown that the instrument was payable to order and not indorsed, or that it was lost after maturity, indemnity will not be required.

NEGOTIABLE INSTRUMENTS—CERTIFICATE OF DEPOSIT.—BONA FIDE PURCHASER.—A certificate of deposit in the usual form, issued by a bank

and made payable to order or bearer, is negotiable, and a *bona fide* purchaser thereof for value before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper.

NEGOTIABLE INSTRUMENTS.—THE NEGOTIABILITY OF A CERTIFICATE OF DEPOSIT in the usual form, issued by a bank and made payable to order or bearer, is not destroyed either by a stipulation for the return of the certificate, or by a provision for payment "in current funds," or by a provision that the amount thereof shall bear interest if left six months, but no interest after six months.

NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER.—A CERTIFICATE OF DEPOSIT as follows: "This certifies that R. K. has deposited in this bank \$3,000, payable to the order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With interest at six per cent if left six months; no interest after six months," becomes due so as to charge a purchaser with notice of equities at the expiration of six months, and not until then.

TRIAL—FINDINGS—GENERAL AND SPECIAL—JUDGMENT.—In actions tried by the court there must be a general finding, and, if requested by one of the parties, a special finding. A vague, uncertain, or indefinite special finding will not support a judgment upon a direct attack.

APPEAL—REVERSAL OF JUDGMENT FOR WANT OF FINDINGS.—If there is no general finding logically covering all of the essential issues in an action, and there is no special finding as to such issues, the judgment must be reversed.

L. W. Billingsley and R. J. Greene, for the appellant.

Tibbets, Morey & Lewis, for the appellee.

487 IRVINE, C. A brief statement of the pleadings is necessary to a consideration of this case. The plaintiff in error was the plaintiff in the district court. In her petition she avers 488 that on December 4, 1890, she deposited with the defendant bank three thousand dollars, for which the defendant issued to her a certificate of deposit; that on or about June 6, 1891, she lost the certificate and at once gave notice of loss to the defendant; that she had not at the time of the loss or at any other time indorsed the certificate or in any way negotiated or hypothecated the same. The prayer was for a judgment for the amount of the certificate with interest.

The defendant, by its answer, admits the deposit and the issuance of a certificate in words and figures as follows:

"FIRST NATIONAL BANK,

"HASTINGS, NEBRASKA, Dec. 4, 1890. 28906.

"This certifies that Miss Rose Kirkwood has deposited in this bank three thousand dollars (\$3,000), payable to the order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With

interest at six per cent if left six months; no interest after six months.

C. B. HURTON, for Cashier.

“Certificate of deposit.”

The defendant further alleged that when the plaintiff demanded payment she failed to produce the certificate, claiming that she had lost it; that the defendant was at all times ready and willing to pay the certificate upon its production, or, if lost, to pay it upon the execution and delivery of a sufficient indemnifying bond. The defendant then denied each and every allegation in the petition not specifically admitted or modified, and prayed that the plaintiff be ordered to execute and deliver an indemnity bond to secure it against any loss by reason of said certificate.

There was a trial upon these pleadings, a jury being expressly waived, and the following finding and judgment were entered:

“This cause comes finally on to be heard upon the petition of the plaintiff, the answer of the defendant, and the ~~489~~ evidence, and the same is submitted to the court; upon consideration, the court finds that there is due to the plaintiff from the defendant upon the cause of action set out in her said petition the sum of three thousand and ninety dollars.

“It is therefore considered and adjudged by the court that the plaintiff have and recover of and from the said defendant the said sum of three thousand and ninety dollars, and that each party to this action pay half of the costs herein.

“It is also considered and ordered by the court that the defendant pay the said sum of three thousand and ninety dollars to the clerk of this court, to be paid over to said plaintiff upon the filing by plaintiff, with the clerk of this court, of a good and sufficient bond of indemnity with approved sureties, to be approved by said clerk, indemnifying the said defendant against any and all liability which may hereafter arise and might subject the said defendant to the payment of the said certificate of deposit, as set out in said petition, and heretofore lost by said plaintiff.”

The plaintiff brings the cause here, assigning several errors, all, however, going to the authority of the court to make an order requiring a bond of indemnity. There is no bill of exceptions, and the case can be reviewed only upon the petition, answer, and judgment.

There is a great deal of argument in the briefs to the effect that the action was begun as one at law; that an action at

law can only be maintained upon a lost instrument when it is non-negotiable, or, if negotiable, when lost after maturity or unindorsed, and that in any event in an action at law no indemnity can be required. These distinctions have been recognized in England and generally in those of the United States where the courts of law and equity are distinct. But counsel lose sight of the fact that our district courts are courts of general law and equity jurisdiction; that the code abolishes formal distinctions between law and equity, and that where a cause of action, either at law or in equity, is stated in a petition the district court may ⁴⁹⁰ administer relief according to the nature of the case, without regard to forms of action. Had the old practice prevailed, upon the tender of proper issues, if the court had found that indemnity was proper, the plaintiff could have obtained no relief if she began at law. Had she begun in equity she would have obtained the appropriate relief according to the pleadings and the proof. Under our practice, she alleging a state of facts entitling her to relief at law and the defendant by answer setting up facts entitling it to equitable relief, the question is not one of jurisdiction, but of proof, and the court had jurisdiction to enter either an absolute judgment or one conditioned upon the execution of an indemnity bond according as the proof might justify. The rule as to whether or not indemnity should be required in an action upon a lost instrument has been practically settled in this state. In *Mowery v. Mast*, 14 Neb. 510, it was held that where a negotiable instrument is lost after it becomes due, a recovery may be had in a court of law. This was a case where the suit had been begun originally before a justice of the peace, and his jurisdiction depended upon that question. It was there said: "Where a negotiable instrument, in such form that the legal title will pass to the holder by delivery, is lost before it becomes due, there is good reason for requiring a bond of indemnity from the person who has lost the instrument to recover the amount due thereon. In such case the action should be brought in a court of equity, which may impose suitable conditions upon the plaintiff before he will be permitted to recover. But where it is clearly shown that an instrument is lost after it has become due, and an action is brought thereon by the actual owner, no indemnity would seem to be necessary. The instrument will stand on the same ground as though it was non-negotiable, and a recov-

ery thereon by the actual owner will be a complete bar to an action by a party who has received the instrument after it became due." In *Means v. Kendall*, 35 Neb. ⁴⁹¹ 693, it was held that, where a negotiable note is lost before it is due, the court will require indemnity; but, where lost after due, no bond will ordinarily be required. It does not appear in that case whether or not the note was negotiable by delivery only; but from the language of the first case cited, and upon general principles as settled by the weight of authority (Daniel on Negotiable Instruments, sec. 1481), indemnity will not be required where the instrument is payable to order and clearly shown not to have been indorsed, even if lost before maturity, because in that event the maker would be subjected to no liability. Applying the rules to this case no indemnity should be required unless the instrument was negotiable. So far as the character of the instrument is concerned as being a certificate of deposit, and for the present disregarding its particular phraseology, this court has said that "the established doctrine is that a certificate of deposit in the usual form, issued by a bank and made payable to order or bearer, is negotiable, and a *bona fide* purchaser thereof for value before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper": *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71; 33 Am. St. Rep. 618.

Was there any thing upon this certificate to take it out of the general rule and render it non-negotiable? It is argued that the provision that it should be payable "on return of this certificate, properly indorsed," destroys its negotiability. That, however, was the language of the certificate in *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71, 33 Am. St. Rep. 618, and such certificates were there treated as negotiable paper. It has, indeed, been frequently said that the stipulation for the return of the certificate adds nothing to the instrument. It is merely the expression of a rule which applies to all negotiable paper, and an action may be maintained without a previous presentment. This question was thoroughly considered in the case last cited. As to the requirement ⁴⁹² that it should be properly indorsed, it would seem that an indorsement by the payee would not be necessary. A "proper" indorsement is such an indorsement as the law merchant requires in order to authorize a payment to the holder. If presented by the original payee, no indorse-

ment would be proper, or at least necessary; if presented by another, "proper indorsement" to show his title would be requisite. We do not think that this provision operates as a condition destroying the negotiability of the instrument.

It is next said that the amount of payment is uncertain, and the instrument, for that reason, non-negotiable. This argument is predicated chiefly upon the provision that the certificate is payable "in current funds." We are aware that many courts have held that such a clause does not require payment in money, and destroys the negotiability of the instrument. The cases so holding are either cases arising at a time when many forms of bank notes and bills were in use, varying in their values, or cases decided upon the authority of that class without regard to changed conditions. With regard to existing conditions, we think the supreme court of the United States has declared the law correctly in *Bull v. Bank of Kasson*, 123 U. S. 105, as follows: "Within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term 'current funds' has been used to designate any of these, all being current, and declared by positive enactment to be legal tender. It was intended to cover whatever was receivable and current, by law, as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words." This, also, is the doctrine of the court of appeals ⁴⁹² of New York: *Pardee v. Fish*, 60 N. Y. 265; 19 Am. Rep. 176; and the supreme court of Illinois has held that a check so drawn entitles the holder to demand coin or its equivalent: *Galena Ins. Co. v. Kupfer*, 28 Ill. 332; 81 Am. Dec. 284. We are satisfied with the reasoning of these cases as against the contrary authorities, and therefore hold that a provision for payment in current funds is, in effect, for payment in money, and that such an instrument, if having the other requisites, is negotiable.

It is also contended that the negotiability of the instrument was destroyed by uncertainty of amount arising from the provision that it should draw interest at six per cent if left six months, but no interest after six months. In *Lamb v. Story*, 45 Mich. 488, it was held that the negotiability of a

note payable on or before two years from date was destroyed by a memorandum attached, providing that if paid within one year there should be no interest, and that case is cited by Mr. Daniel in support of a similar statement, and is the only authority cited. We are not satisfied with that doctrine. In *Hope v. Barker*, 112 Mo. 338, 34 Am. St. Rep. 387, the provision was "without interest thereon if paid at maturity; if not paid at maturity, to bear interest from date." It was held that that provision did not destroy the negotiability of the note, the note on its face showing what should be paid at any particular time, and being therefore certain in its terms. The circuit court of appeals for the sixth circuit has recently held that a provision for interest after maturity and attorney's fees did not render a bill non-negotiable, saying: "It is intended to be a circulating medium until maturity. For this purpose every purchaser must know exactly what will be or ought to be paid on it at maturity. It only has currency upon the hypothesis that it is to be paid at that time. If the sum then to be paid is fixed and certain, we do not see why that is not sufficient." We think the same reasoning applies here. Every purchaser has upon the face of the note evidence of the exact amount ⁴⁹⁴ to be paid. If he takes it within six months he knows that the amount to be paid, if presented within that period, is the face of the certificate without interest; that if presented at the end of six months, or at any subsequent time, the amount is the face of the certificate with interest for six months at the rate of six per cent. Nothing could be more certain or more absolute.

When did the certificate become due so as to charge a purchaser with notice of equities? There could be no doubt that if the certificate had provided simply for payment upon presentment properly indorsed it would be in effect a promissory note payable on demand, and would be overdue, so as to charge a purchaser with notice, at the latest after the lapse of a reasonable time for presentment: Daniel on Negotiable Instruments, 783. But the terms of this instrument are different. It was to draw interest if left six months, but in no event to draw interest after six months. In *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71, 33 Am. St. Rep. 618, an instrument payable upon the return of the certificate properly indorsed, but bearing across its face the language, "This certificate payable three months after date with six

per cent interest per annum for the time specified," was held to be payable three months after date. There the language was absolute and the construction given was undoubtedly correct. We should here follow the rule adopted in that case, and so construe the certificate as to give effect to every part. It would seem that the result would be to reach an analogy to instruments payable "on or before" a certain date, which are due at the expiration of the time so fixed and not before: *Mattison v. Marks*, 81 Mich. 421; 18 Am. Rep. 197; Daniel on Negotiable Instruments, sec. 43. Surely a purchaser reading this certificate within six months from its date, observing that if presented before the expiration of six months it would draw no interest, but if presented at the end of that period would bear interest, would be justified in presuming that it had not ⁴⁹⁵ been presented. Equally certain it is that seeing it after the expiration of six months, and observing by its terms that it could draw no interest thenceforth forever, he would be put upon inquiry to ascertain why it had not been presented when interest ceased. We think the instrument should be treated, so far as ascertaining the rights of purchasers, as one payable on or before six months after date; or if not, that then, from the peculiar nature of the contract, six months after date should be treated as the reasonable time within which it should be presented, and a purchaser taking it within that period should be considered as a purchaser before maturity. Adopting, then, the conclusions we have outlined, this was a negotiable instrument which a *bona fide* purchaser for value within six months from its date would be entitled to enforce against the defendant.

Recurring now to the judgment it will be seen that the only finding upon the issues was "that there is due to the plaintiff from the defendant upon the cause of action set out in her said petition the sum of three thousand and ninety dollars." Does this finding support the judgment rendered? In several cases the general doctrine has been announced that a finding need be no more specific than the verdict of a jury upon the same pleadings. Upon this rule it has been held that where a justice of the peace rendered judgment, saying, "it was found by this court that the plaintiff have and recover" a certain sum, was sufficient; but the issue in that case was practically the general issue upon a claim and counterclaim: *Ransdell v. Putnam*, 15 Neb. 642. In *Rhodes v. Thomas*, 31 Neb. 848, a justice rendered a judgment as fol-

lows: "Court convenes and defense proceeds with examination of witnesses, after which case is argued by parties and submitted to the court, with the following finding: October 17, 1888, after hearing the evidence, it is therefore considered by me that the plaintiff have and recover from the defendant the ⁴⁹⁶ sum of sixty-nine dollars and fifteen cents." This was held equivalent to a general finding; but the case rested largely upon the liberality with which records of a justice of the peace should be construed. In several cases similar judgments have been sustained as against collateral attacks, upon the ground that while they might be voidable they were not void. *Black v. Cabon*, 24 Neb. 248, is an example of this class of cases. Upon the other hand it has been several times held that in actions tried by the court there must be a general finding and, when requested by one of the parties, a special finding, and, if this finding be vague, uncertain, or indefinite, it will not sustain a judgment when attacked directly: *Sprick v. Washington County*, 3 Neb. 253; *Smith v. Silvis*, 8 Neb. 164; *Crossley v. Steele*, 13 Neb. 219; *Foster v. Devinney*, 28 Neb. 416. Had the issue in this case been simply as to the amount of recovery, or had it been such that a finding of an amount due plaintiff from the defendant would logically cover the essential issues, we might treat it as sufficient to determine the case and authorize a judgment; but the most that can be claimed for the finding is that it determined the amount of the certificate, and that it determined that the plaintiff remained the owner thereof. The determination of these issues was not sufficient to adjudicate the case. The plaintiff avers that she lost the certificate on or about the 6th of June, which would be after maturity, as we have construed the certificate. She also avers that she had never indorsed it. A determination of either of these facts in her favor would entitle her to an absolute judgment against the defendant without a requirement for indemnity. The defendant by its general denial put both facts in issue. If it were shown that she lost the certificate before it was due, and that before its loss she had indorsed it so that it became payable to bearer, then payment could not be required except upon the giving of indemnity. We have not the evidence before us, and the court did not find upon either of these issues. Upon their determination ⁴⁹⁷ the character of the judgment must depend. There is, therefore, no finding sufficient to sustain that portion of the judgment requiring

indemnity. That portion of the judgment is reversed and the cause remanded for a new trial upon the issues relating to the defendant's claim for indemnity.

Judgment accordingly. —

ACTIONS—LAW AND EQUITY.—If the common law and chancery jurisdictions are vested in one tribunal a court sitting in equity will decide questions of law as well as equity, and grant relief accordingly. Equitable relief may be granted in a legal action in those states in which law and equity are administered by the same tribunal: See note to *Worthington v. Waring*, 34 Am. St. Rep. 301.

LOST NOTE—ACTION AT LAW MAINTAINABLE UPON, WHEN.—INDEMNITY: See *Adams v. Baker*, 16 R. I. 1; 27 Am. St. Rep. 721, and note; *West Philadelphia etc. Bank v. Field*, 143 Pa. St. 473; 24 Am. St. Rep. 562, and note; *Clark v. Snow*, 60 Vt. 203; 6 Am. St. Rep. 108, and note; *Bainbridge v. City of Louisville*, 83 Ky. 285; 4 Am. St. Rep. 153, and note.

BANKS—CERTIFICATES OF DEPOSIT.—NEGOTIABILITY OF: See *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71; 33 Am. St. Rep. 618, and note; *Klauber v. Biggerstaff*, 47 Wis. 551; 32 Am. Rep. 773.

BANKS—CERTIFICATES OF DEPOSIT.—WHEN DEEMED OVERDUE: *Tripp v. Ourtenius*, 36 Mich. 494; 24 Am. Rep. 610; *Hows v. Hartness*, 11 Ohio St. 449; 78 Am. Dec. 312.

BANKS—CERTIFICATES OF DEPOSIT.—TRANSFER OF WHEN OVERDUE.—DEFENSES: See *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71; 33 Am. St. Rep. 618, and note.

NEGOTIABLE INSTRUMENTS.—RIGHTS OF BONA FIDE HOLDERS: See *Cover v. Myers*, 75 Md. 406; 32 Am. St. Rep. 394, and note; *Richards v. Monroe*, 85 Iowa, 359; 39 Am. St. Rep. 301, and note.

AMERICAN INVESTMENT COMPANY v. NYE

[40 NEBRASKA, 720.]

MORTGAGED PREMISES—JUDICIAL SALE OF—WHO MAY MAKE.—The trial court has the power, in a foreclosure suit, to appoint some proper disinterested person, other than the sheriff of the county, as master commissioner, to make the sale of the mortgaged premises. The plaintiff cannot dictate the person.

APPEAL—SALE OF MORTGAGED PREMISES—DISCRETION OF COURT.—The appointment of a person to make the sale of mortgaged real estate, in an action to foreclose, rests in the sound discretion of the trial court, and, if no abuse is shown, its ruling will not be reviewed.

APPEAL—FINAL ORDER—WHAT IS NOT.—The trial court's denial, in an action of foreclosure, of an application for the appointment of a special master commissioner to make sale of the mortgaged land, is not a final order from which an appeal will lie. Such ruling cannot be reviewed, on appeal, prior to the rendition of a final decree of foreclosure.

Logan & Bisbee and L. K. Alder, for the appellant.

P. D. McAndrew, for the appellee.

¶⁷²⁰ NORVAL, C. J. Appellant brought an action in the court below against William H. Nye and wife for the foreclosure of a real ¶⁷²¹ estate mortgage. Subsequently plaintiff, by leave of court, filed an amendment to its petition, praying the appointment of one P. J. Murphy, or some suitable person other than the sheriff, as special master commissioner, to make the sale of the real estate. W. H. Magill, the sheriff of the county, was permitted, over the plaintiff's objection, to intervene and file an answer to the amended pleading. The question of who should be appointed to make the sale was heard upon affidavits, and the court overruled the application for the appointment of a special master commissioner. From this decision plaintiff appeals.

In *State v. Holliday*, 35 Neb. 327, after quoting sections 451-453, and 852 of the Code of Civil Procedure, this court said: "It will thus be seen that while a sheriff may sell real estate under a mortgage foreclosure, and as he has given bond for his official acts, and is presumed to be familiar with his duties, he is usually appointed for that purpose, or permitted to conduct the sale. The court, however, may appoint another to perform that duty. The court is presumed to act impartially, and for the best interests of both the creditor and debtor. . . . The officer making the sale, whether he be sheriff or a master commissioner appointed by the court, is so far under its orders as to be answerable to it for any abuse of its powers or violations of his duty, and no doubt the court, upon the proper application, and being convinced that there was danger of an abuse of power on his part, may remove him, and appoint another in his place. Neither the court itself, nor any of its officers, has any right to show partiality or unfairness in the performance of his functions, and it is the duty of the court to see that its officers do not give cause for suspicion of wrong."

The statute, as we read it, does not confer upon a plaintiff the right to dictate the person who shall make the sale of the mortgaged premises. Whether the sheriff, or some disinterested person in his stead, shall be appointed to conduct ¶⁷²² or make the sale of real estate under a decree of foreclosure rests in the sound legal discretion of the trial court, and unless there has been an abuse of discretion in that regard, and

prejudice has resulted therefrom, this court will not disturb the decision.

In the case before us we are precluded from reviewing the ruling complained of, because the record fails to disclose that a decree of foreclosure has yet been entered in the district court. The overruling plaintiff's application is not a final order. So far as this record shows, the action is still pending and undisposed of on the merits in the district court, and therefore the order in question is subject to review there, up to the time of the rendition of the decree of foreclosure, if one should be granted. Should a decree be denied, there will be no necessity for a sale. The appeal is dismissed.

Appeal dismissed.

APPEAL.—A clerk and master in chancery cannot appeal from an interlocutory order appointing another than himself a commissioner to sell real estate: *Green v. Harrison*, 6 Jones Eq. 253; 82 Am. Dec. 415.

STEELE v. ASHENFELTER.

[40 NEBRASKA, 770.]

CHATTEL MORTGAGE.—A mortgage of property to be thereafter acquired is invalid as against purchasers and attaching creditors of the mortgagor.

J. E. Cobbley, for the appellant.

A. J. Hale, for the appellee.

¶71 Post, J. This was an action of replevin in the district court of Gage county. A trial was had before a court without a jury, which resulted in a finding and judgment for the defendant, whereupon the cause was removed to this court by petition in error. The material facts are as follows:

The Beatrice Rapid Transit and Power Company, on the twenty-eighth day of February, 1891, executed a mortgage upon all of its corporate property, and all property to be thereafter acquired by it. On the eighth day of September, 1893, one Hale recovered judgment against said company in the county court of Gage county for forty-six dollars and twenty-one cents. On the same day an execution was issued thereon and placed in the hands of the defendant as constable for service. The defendant, in order to satisfy said execution, levied upon certain property owned by the afore-

said corporation, purchased by it subsequent to the execution of the mortgage, but which was intended for use in the extension of its lines and business. Some time subsequent to the last-mentioned date the plaintiff was appointed receiver for said company on the suggestion of the holders of the mortgage bonds, and brought this action to recover the property above mentioned, which was still held by the defendant by virtue of the aforesaid execution.

It will be seen from this statement that the question presented is whether, as against Hale, the execution plaintiff, the mortgage includes the after-acquired property of the mortgagor. The question thus presented is one upon which the authorities are by no means harmonious. The doctrine of *Holroyd v. Marshall*, 10 H. L. Cas. 191, has been recognized by many of the courts in this country. In those jurisdictions the rule is that, while at law a mortgage of after-acquired property confers no rights as against purchasers and attaching creditors, in equity it is effectual to charge the property, when acquired by the mortgagor, with ⁷⁷² an equitable lien, which will prevail, not only as against the latter, but also as against attaching creditors. The distinction above noted between the rule at law and in equity can, of course, have no place under our practice where the two remedial systems are blended into one. Therefore, if the corporation, for which the plaintiff stands, by its mortgage acquired a lien which is enforceable in equity as against the execution plaintiff, such lien is available to him in this action. If the question was an open one in this state the cases which recognize the rule in *Holroyd v. Marshall*, 10 H. L. Cas. 191, would be entitled to great consideration, but we regard it as settled by the case of *Cole v. Kerr*, 19 Neb. 553, in which it is distinctly held that a mortgage of a crop to be planted conveyed no lien upon crops subsequently raised by the mortgagor as against judgment creditors of the latter.

2. Plaintiff in error has referred us to the statute authorizing railroad and street-car companies to mortgage their property, but we find therein no ground for his contention. By the first-named provision (Cobbey's Statutes, sec. 612) railroad companies are authorized to convey by mortgage or trust deed all property owned by them at the time of the execution thereof, and all property, personal and real, which they may thereafter acquire. This authority is found in the Revised Statutes of 1866, page 231, under the title "Corpo-

rations." The other provision to which reference is made is found in section 632 of Cobbey's Statutes, and authorizes the mortgaging by a street-car company of "property, in whole or in part, including its real and personal property and franchises." This provision is contained in section 6 of the act of 1889, entitled "Street Railway Consolidation," and is merely declaratory of the common law. The purpose of the section is apparent from the subsequent provisions containing limitations with respect to the rate of interest and denomination of bonds. We can find in the statutes cited no support for ⁷⁷³ plaintiff's claim. The judgment of the district court is accordingly affirmed.

MORTGAGES ON CHATTELS NOT YET ACQUIRED.—As to the validity and effect of chattel mortgages upon property to be acquired, see collected cases in note to *Borden v. Clark*, 19 Am. St. Rep. 30; *Shellabarger v. Mottin*, 47 Kan. 451; 27 Am. St. Rep. 306; notes to *Moore v. Byrum*, 30 Am. Rep. 63-68; *McCuffrey v. Woodin*, 22 Am. Rep. 653-656.

GUTTA PERCHA AND RUBBER MANUFACTURING COMPANY v. OGALALLA.

[40 NEBRASKA, 775.]

MUNICIPAL CORPORATIONS—CONTRACTS—RATIFICATION OF.—If the contract of a municipal corporation is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed *ultra vires*, and can be ratified only upon the conditions essential to a valid agreement in the first instance; but, if the formalities prescribed or conditions imposed are not intended as a restriction upon the corporate power, a binding ratification may be made in a different mode.

MUNICIPAL CORPORATIONS—NOTICE AS TO POWER OF.—One who contracts with a municipal corporation must, at his peril, take notice of the powers conferred by its charter, and whether the proposed indebtedness is in excess of the limitation imposed thereby.

EVIDENCE—RECORDS—WITNESSES.—Upon an issue as to whether a particular fact is of record, any person who has examined the books where it should be found, and shows a sufficient knowledge of their contents, is competent to testify that such fact does not appear of record therein.

J. R. Brotherton, Tibbets, Morey & Ferris, and Grimes & Wilcox, for the appellant.

Albert Muldoon and John J. Halligan, for the appellee.

⁷⁷⁷ Post, J. This was an action by the plaintiff in error against the defendant in error in the district court of Keith county to recover the price of certain hose, hose-carts, reels,

ladders, and other apparatus of like character in common use by town and village fire companies. It is alleged that said property was sold and delivered to the defendant, at its request, on the twenty-ninth day of April, 1887, for the agreed price of five hundred and sixty-nine dollars, and for which amount judgment was demanded. An answer was interposed, in which it was alleged, in substance, that although the board of trustees of the defendant village entered into an agreement to purchase from the plaintiff the property mentioned in the petition and for the price therein stated, said agreement is void, for the reason that no appropriation had previously been made for the purchase of said property, or that was available for said purpose; and that during the municipal years of 1885 and 1886 and ⁷⁷⁸ 1886 and 1887 said village had made no appropriation, by ordinance, resolution, or otherwise, for the defraying of any part of the expenses thereof, and that said defendant never received or appropriated said property or otherwise ratified said agreement. The reply was, in substance, a general denial of the allegations of the answer. The provision of the statute relied upon by the defendant is section 89 of chapter 14 of the Compiled Statutes, entitled "Cities of the second class and villages," which reads as follows: "No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." The evidence introduced at the trial fully sustains the allegation of the answer as to the failure of the village to make an appropriation available for the payment of the plaintiff's claim, whereupon the latter offered to prove by witnesses present that the village had received the property in controversy, paying the freight thereon, and had used it continuously since that time. That offer was rejected on the objection of the defendant village, and a verdict of no cause of action returned under the direction of the court. Judgment was subsequently entered upon the verdict, whereupon the cause was removed to this court by the petition in error of the plaintiff company.

There is practically but one question for consideration, and which is fairly presented by the offer and ruling above

named. In this connection it should be remarked that no claim is made that this case is within any of the exceptions contemplated by the statute quoted. The cases bearing upon the question of the power of municipal corporations to ratify their unauthorized contracts are confusing⁷⁷⁹ and apparently irreconcilable. It would subserve no useful purpose to examine them at length in this connection or to attempt a statement of the grounds upon which they rest. It is sufficient that there is one principle which seems to run through them all, viz: If a contract is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed *ultra vires*, and can be ratified only upon the conditions essential to a valid agreement in the first instance; but, where the formalities prescribed or conditions imposed are not intended as a restriction upon the corporate power, a binding ratification may be made in a different mode: *Town of Durango v. Pennington*, 8 Col. 257; *McCracken v. City of San Francisco*, 16 Cal. 623; *San Diego Water Co. v. City of San Diego*, 59 Cal. 517, 522; *Cory v. Freeholders of Somerset*, 44 N. J. L. 445; *Keeny v. Jersey City*, 47 N. J. L. 449; *Newman v. City of Emporia*, 32 Kan. 456; *McBrian v. City of Grand Rapids*, 56 Mich. 103; *McDonald v. Mayor of New York*, 68 N. Y. 23; 23 Am. Rep. 144; *Smith v. City of Newburgh*, 77 N. Y. 130; *Agawan Nat. Bank v. South Hadley*, 128 Mass. 503; *Dillon on Municipal Corporations*, 4th ed., 457. It is plain that the statute under consideration is mandatory, and an express limitation upon the powers of cities and villages of the class to which it applies. Indeed, stronger language could not have been used, and its meaning is too apparent for construction. It is the recognized doctrine that whoever contracts with a municipality must, at his peril, take notice of the powers conferred by its charter and whether the proposed indebtedness is in excess of the limitations imposed thereby: *Hodges v. City of Buffalo*, 2 Denio, 110; *Lowell Five Cents Savings Bank v. Winchester*, 8 Allen, 109; *People v. May*, 9 Col. 80; *Law v. People*, 87 Ill. 385; *French v. City of Burlington*, 42 Iowa, 614. As said in the case last named, "any other rule leaves the taxpayer at the mercy of the officers of the city and contractor, and would render the constitutional provision nugatory."⁷⁸⁰ Such a result cannot be contemplated or allowed to prevail." And if a recovery is sanctioned upon a contract like this, on the

ground that it has been subsequently ratified, surely legislative restrictions upon corporate powers is in vain. It would then be within the power of willing or corrupt officers to accomplish by indirection that which is prohibited in the most explicit terms of the statute or charter. There may be cases in which considerations of equity and good faith will impose upon a municipal corporation the duty of returning property, or its equivalent, where an action would not lie upon contract, express or implied. That question is, however, not presented by the record of this case, and is not decided.

2. The defendant was permitted, over the objection of the plaintiff, to prove by a witness called for that purpose that he, witness, had examined the minutes of the proceedings of the village board for the years beginning in May, 1886, and ending May, 1887, and that said minutes contained no record of any appropriation for the purchase of the apparatus in controversy, or for defraying any of the expenses of the village during said period. Exception was taken to that ruling, which is also assigned as error. The objection urged to the testimony of the witness is that it is secondary only. A sufficient answer to that objection is that the record referred to by the witness had previously been offered in evidence by the plaintiff, and received without objection. We must presume that the book being in evidence the court and jury were fully advised with respect to its contents, as far at least as material to the question at issue. But it was not secondary evidence. That contention is based upon an entire misconception of the rule, which excludes only that evidence which of itself indicates the existence of more original sources of information: 1 Greenleaf on Evidence, 82. Any person who has examined offices or records, and shows a sufficient knowledge of their contents, will be permitted to testify that a particular ^{fact} fact does not appear of record therein: *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54. There is no error in the record, and the judgment of the district court is affirmed.

MUNICIPAL CORPORATIONS—RATIFICATION OF ULTRA VIRES CONTRACTS. Ratification necessary to make a municipal corporation liable for the unauthorized acts of its officers must be shown by some affirmative action. Acquiescence is not enough: *Murphy v. City of Albina*, 22 Or. 106; 29 Am. St. Rep. 578, and note. *Ultra vires* contracts of municipal corporations cannot be validated by estoppel: *Young v. Board of Education*, 54 Minn. 385; 40 Am. St. Rep. 340, and note; and see also the note to *Nashville v. Sutherland*, 36 Am. St. Rep. 95.

MUNICIPAL CORPORATIONS.—PERSONS CONTRACTING WITH A MUNICIPAL CORPORATION ARE BOUND TO KNOW THE LIMITS of its powers: *Matheson v. Grand Rapids*, 88 Mich. 553; 26 Am. St. Rep. 299, and note, with the cases collected.

MUSSEY v. KING.

[40 NEBRASKA, 392.]

REPLEVIN—PLEADING AND EVIDENCE.—In replevin, as in all other actions, the evidence should correspond to the allegations in the pleadings. If the plaintiff bases his right of possession on the claim of ownership of the property, or lien thereon, he should plead the facts as to such ownership or lien. The same is true if special ownership is claimed.

CHATTEL MORTGAGES—REPLEVIN—PRESUMPTION.—In the absence of all evidence on the subject there is no presumption of law, in a replevin suit by the holder of a chattel mortgage, to recover possession of the property described therein from a third party, that the mortgagor was, at the time, either the owner or in possession of the property mortgaged.

REPLEVIN—EVIDENCE—CHATTEL MORTGAGES—ASSIGNMENT.—If, on an issue in replevin, as to the ownership and right of possession to the property, it appears that a note was given by a third party to a fourth for a debt, and was secured by a chattel mortgage on the property replevied, the note and mortgage, though assigned to the plaintiff, are not admissible in evidence, as they do not tend to prove the issue.

CHATTEL MORTGAGES—NATURE OF—NEED NOT BE IN WRITING.—A chattel mortgage, whether in writing or not, is a pledge of personal property to secure the promise of the mortgagor or some one for whom he stands sponsor. It need not be in writing.

CHATTEL MORTGAGES—TITLE OF MORTGAGEE.—The mortgagee of chattels is not the owner of the legal title thereto. It is in the mortgagor until divested by foreclosure proceedings and sale in pursuance of the statute. Until then the mortgagee has merely a lien upon the property.

Thomas L. Redlon, for the appellants.

C. H. Bane, for the appellee.

393 RAGAN, C. M. P. Mussey & Co. brought a suit in replevin in the district court of Sheridan county against John King, and alleged in their petition that they were the owners of, and entitled to, the immediate possession of certain chattels, and that John King unlawfully detained possession of said chattels from them. To this petition John King filed an answer, consisting of a general denial. King had a verdict 394 and judgment, and Mussey & Co. bring the case here on error. On the trial of the case Mussey & Co. proved that one William B. King, on the 16th of December, 1889, gave his note to one Nathan Tibbets, and, to secure the same, at the same time executed to Tibbets a chattel mortgage on

the property involved in this suit; that said William B. King died insolvent on the sixteenth day of February, 1891, and that Tibbets had assigned the note and the mortgage securing the same to Musser & Co. After this proof was made, Musser & Co. offered in evidence the note and chattel mortgage. John King objected to their introduction in evidence on the ground, among others, that no proper foundation was laid for their admission in evidence, and that they did not tend to prove the issue made by the pleadings. The district court sustained the objection, and excluded the note and chattel mortgage, to which ruling Musser & Co. took an exception. No other or further evidence was offered on the trial of the case. The only error assigned here is the ruling of the district court in excluding from the jury this note and mortgage. The issue in the case was the right of Musser & Co. to the immediate possession of the property replevied, and by their petition they predicated their right to the possession of the property on their ownership of the same.

In replevin, as in all other actions, the evidence should correspond to the allegations in the pleadings. If Musser & Co. based their right, as is probable, to the possession of this property on their ownership of the note and chattel mortgage, they should have so stated in their petition. In other words they should have pleaded the facts. If they claimed to be the actual owners of the property an allegation that they were the owners of it was sufficient. If they claimed a special ownership in, or lien upon, the property, and predicated their right to the possession of the property on such special ownership or lien, the petition should have stated the facts in reference thereto: *Haggard* 895 v. *Wallen*, 6 Neb. 271. The note and mortgage offered did not tend to prove that Musser & Co. were either the owners of, or entitled to, the possession of the property. There was no evidence offered showing that William B. King was either the owner or in possession of this property at the time he mortgaged it to Tibbets. The law, in the absence of all evidence on the subject, will not indulge the presumption that one who made a mortgage upon chattels was either the owner of, or in possession of, such property at the time he made such mortgage when the holder of such mortgage seeks to recover possession by replevin of such property from a third party: *Everett v. Brown*, 64 Iowa, 420; *Warner v. Wilson*, 73 Iowa, 719; 5 Am. St. Rep. 710; *Gibbs v. Childs*, 143 Mass. 103.

The petition in this case was doubtless framed upon the theory that the mortgagee of chattels is the owner of the legal title thereto, and in *Adams v. Nebraska City Nat. Bank*, 4 Neb. 370, it was so decided. An examination of that case, however, shows that the point was not necessary to a decision of the case. The action was brought by a mortgagee of chattels in possession thereof to restrain a sheriff from levying upon and selling said chattels under an execution against such mortgagee, and the court held that the petition did not state such a case as authorized the interference of a court of equity to restrain the sale. There can be no question but that the conclusion reached was a correct one; but the other point stated in the first paragraph of the *syllabus* of the case, viz., "A mortgage of chattels transfers to the mortgagee the whole legal title to the thing mortgaged," was not involved in the case. This case, if not expressly, has in effect been many times overruled by the decisions of this court; and we think it is the almost universal understanding of both the bench and the bar of the state that the mortgagee of chattels acquires only a lien upon the mortgaged property, and not the legal title thereto, by virtue of such mortgage. That ~~see~~ the interest of a mortgagee in chattels is that of a mere lien has been frequently recognized by this court.

In *Tompkins v. Batis*, 11 Neb. 147, 38 Am. Rep. 361, it was held: "A mere tender of the amount secured by a chattel mortgage to the creditor on the day fixed for payment, although not accepted nor kept good, has the effect to release the property from the lien of the mortgage." This case was reaffirmed in *Knox v. Williams*, 24 Neb. 630; 8 Am. St. Rep. 220.

In *Gillilan v. Kendall*, 26 Neb. 82, 18 Am. St. Rep. 766, the court said: "The mortgagor of chattels, until foreclosure, possesses a beneficial interest in the property mortgaged, and will convey a good title by a sale of such property to one who purchases in the open market in good faith and without notice, actual or constructive, of the mortgage."

A chattel mortgage has also been recognized by this court as a mere lien upon the property mortgaged in the following cases: *Marseilles Mfg. Co. v. Morgan*, 12 Neb. 66; *Grand Island Banking Co. v. Frey*, 25 Neb. 66; 13 Am. St. Rep. 478; *Gandy v. Dewey*, 28 Neb. 175.

In *Grimes v. Farrington*, 19 Neb. 44, the court held that the mortgagor of personal property, upon which an attach-

ment issued against him had been levied, had the right, under the provisions of section 235 of the Civil Code, to resist the attachment by a motion to discharge the same.

In *Hamilton v. Lau*, 24 Neb. 64, the court said: "In every mortgage there is a trust created in a certain sense in favor of the mortgagor in respect to the residue or surplus after the application of sufficient of the fund to satisfy the claim of the mortgagee."

In *Jordan v. Hamilton County Bank*, 11 Neb. 499, it was held: "Where a senior mortgagee of chattels, for the purpose of depriving of his security a junior mortgagee of a part of the same property, fraudulently releases that portion on which his mortgage is the exclusive lien, the same being adequate security, he will not be permitted, to the prejudice of the latter, to go upon the property covered by the second mortgage for payment of his demand."

⁸⁹⁷ In *Newlean v. Olson*, 22 Neb. 717, 3 Am. St. Rep. 286; the mortgage in controversy contained this clause: "If the mortgagee shall at any time feel unsafe or unsecure he may seize and sell as aforesaid the property." The court held that the words "feel unsafe and insecure" did not authorize the mortgagee to exercise an arbitrary discretion in taking possession of the mortgaged property, but, that before he could take possession thereof, the mortgagor must have done, or been about to do, some act tending to impair the mortgagee's security.

In *Harman v. Barhydt*, 20 Neb. 625, the court said that the transfer of one of several notes secured by a chattel mortgage was an assignment *pro tanto* of the mortgage to the person to whom such note was assigned.

Chapter 12 of the Compiled Statutes of 1893 prescribes one method by which chattel mortgages may be foreclosed. By section 6 of that chapter it is provided that the sale shall be in the daytime, in the county where the mortgage was first filed, or in any county where the property may have been removed by consent of parties, and in which the mortgage has been duly filed. This court construed this statute in *Loeb v. Milner*, 21 Neb. 392. In that case Milner resided in Webster county and made a mortgage of some chattels to Loeb, who resided in Adams county. The mortgage was filed in Webster county, but was never filed in Adams county. Loeb took possession of the chattel property, brought it into Adams county, and advertised and sold it in pursuance of

the statute just quoted. Milner then sued Loeb to recover the value of the property pledged to secure the debt, and the court held, in effect, that the advertising and sale of the property by Loeb in Adams county was a conversion by him of the property, and that he was liable to Milner for its value less the debt which Milner was owing him and which the property was pledged to secure.

These cases show that the doctrine of this court is that ~~the~~ the only interest which a mortgagee of chattel property has therein by virtue of such mortgage is that of a lienholder. A chattel mortgage then, whether in writing or not, is a pledge of personal property to secure the performance of the promise of the mortgagor, or some one for whom he stands sponsor. It need not be in writing: *Conchman v. Wright*, 8 Neb. 1; *Ostertag v. Galbraith*, 28 Neb. 730; *Sloan v. Coburn*, 26 Neb. 607. A bill of sale, absolute on its face, may be shown to be a chattel mortgage: *Omaha Book Co. v. Sutherland*, 10 Neb. 334.

The question is, What was the intention of the parties pledging the property? If it was intended to be a security, then it is a chattel mortgage, no matter how, or in what form, the pledge may be expressed; and the legal title to property pledged by a chattel mortgage remains in the mortgagor until divested by foreclosure proceedings and sale in pursuance of the statute; and, until the legal title of the mortgagor is thus divested, the mortgagee has merely a lien upon the mortgaged property. If the mortgagee of chattel property is the owner of the legal title thereto it would seem that such property should be listed for taxes against him; and yet we do not think that any such a contention can be maintained. Would an indictment for larceny which alleged the property to be in A be sustained by proof that A's title was that of a mortgagee? By section 8 of chapter 12 of the Compiled Statutes of 1893 it is provided that, when a mortgage shall have been foreclosed as provided in the said chapter, all right of equity of redemption which the mortgagor had in such property should be and become extinguished. This is a recognition by the legislature of the mortgagor's title to personal property until the same had been divested by foreclosure proceedings. Section 9 of the same chapter makes the sale, transfer, and disposal of personal property by a mortgagor during the existence of the lien created by such mortgage a felony without first obtaining consent in writing of

the ⁸⁹⁹ owner and holder of the debt secured by such mortgage; and section 10 of said chapter denounces as a felony a removal of the mortgaged property out of the county in which it was situate at the time it was mortgaged, and during the existence of the lien created thereby. Here, again, is another legislative recognition that the legal title to mortgaged chattels remains in the mortgagor thereof until divested by foreclosure proceedings.

The first point of the *syllabus* in *Adams v. Nebraska City Nat. Bank*, 4 Neb. 870, must be overruled. This doctrine, that the mortgagee of chattels is the owner of the legal title thereto, is a judicial myth—a legal fiction. Its origin is somewhat shrouded in obscurity. It probably came to England with the conquering Normans; and certain it is that it was nurtured and grew to maturity under the fostering care of the common-law courts of that country. These courts professed themselves unable to give any construction to a contract except that warranted by the very letter thereof; and it was the equity courts of that country, who, by applying to contracts the doctrine of a great teacher, that “the letter killeth, but the spirit giveth life,” extended to the mortgagor or pledgor of chattels the right to redeem the same by his performing the promise which the pledge was given to secure; and these courts exercised this power upon the theory—as good now as it was then—that the doctrine of forfeiture was abhorrent to the conscience of a chancellor. There are many and respectable authorities which hold to the doctrine that the mortgagee of a chattel is the owner thereof; but these cases, no matter where found, nor by whom written, have for their precedent the common-law English courts. This doctrine, whether it originated in the necessities of Venetian commerce, or had its origin in the feudal system of the Normans, is an alien to our institutions and a stranger to our jurisprudence, where the courts apply both legal and equitable remedies in the administration of justice, and ⁹⁰⁰ where the law requires that contracts shall be construed according to the intention of the parties thereto. It is the construction of Shylock, demanding the pound of flesh, no more nor less, because so nominated in the bond. The judgment of the district court is affirmed.

CHATTEL MORTGAGES.—EFFECT OF UPON TITLE: See notes to *Luckett v. Townsend*, 49 Am. Dec. 731; *Tannahill v. Tuttle*, 3 Mich. 104; 61 Am. Dec. 480, and note; *Lacey v. Giboney*, 36 Mo. 320; 88 Am. Dec. 145, and note.

A chattel mortgage does not pass title to the property, but only creates a lien thereon: *Sayward v. Numan*, 6 Wash. 87, 90; *Kerron v. North Pacific etc. Mfg. Co.*, 1 Wash. 241; *Silsby v. Aldridge*, 1 Wash. 117; *Byrd v. Forbes*, 3 Wash. (Ter.) 318; *Chapman v. State*, 5 Or. 432; *Knowles v. Herbert*, 11 Or. 240; *Binnian v. Baker*, 6 Wash. 50, 51; *Knowles v. Herbert*, 11 Or. 54.

CHATTEL MORTGAGE IS A MERE SECURITY: *Hembree v. Blackburn*, 16 Or. 153, 156; *Byrd v. Forbes*, 3 Wash. (Ter.) 318; *Binnian v. Baker*, 6 Wash. 50, 51; *Silsby v. Aldridge*, 1 Wash. 117, 119.

ORAL CHATTEL MORTGAGES.—VALIDITY OF: See *Bates v. Wiggin*, 37 Kan. 44; 1 Am. St. Rep. 224, and note.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

BEARDSLEE v. DOLGE.

[148 NEW YORK, 100.]

PRACTICE.—THE FACTS STATED IN AN OFFER OF PROOF must be taken as true if the offer is refused and the proposed evidence excluded.

CERTIORARI.—AN ACTION FOR MAKING A FALSE RETURN to a writ of *certiorari* may be sustained though corrupt methods are not attributable to the defendant. The fact that the proceedings on *certiorari* affirm the judgment or other determination sought to be reviewed does not preclude the party against whom the report was made from showing it was false, if the tribunal to which it was made was bound by it and could not inquire whether it was or not.

COURTS AND QUASI-JUDICIAL TRIBUNALS. — HIGHWAY COMMISSIONERS in laying out a highway exercise a special and limited jurisdiction, and their acts may be impeached by showing that they exceeded their powers.

HIGHWAY COMMISSIONERS ARE ANSWERABLE in damages, though no corrupt motive can be imputed to them, if they proceeded in a case in which they had no jurisdiction, as when they laid out a road through a yard or inclosure without the consent of the owner thereof, and the statute prohibited their doing so without such consent.

A COMMISSIONER OF HIGHWAYS IS NOT A JUDICIAL OFFICER in the sense that he is entitled to protection against a civil action for his misconduct in office.

ANY PUBLIC OFFICER GUILTY OF MISFEASANCE OR NONFEASANCE IN OFFICE whereby an individual sustains injury is answerable therefor in an action for damages.

JUDGMENT.—IF THERE IS A WANT OF AUTHORITY to determine the subject matter of the controversy an adjudication upon the merits is a nullity, and does not even estop the assenting party.

JUDGMENT, COLLATERAL ATTACK UPON.—An action against highway commissioners for making a false return to a writ of *certiorari* is in the nature of a collateral attack upon their proceedings, and such an attack can be made if they had no jurisdiction.

CERTIORARI — **SOMETHING MORE THAN THE RECORD IS REMOVED TO THE** higher court by the statutory proceedings upon *certiorari* authorized by the laws of New York. It is the duty of the special tribunal whose proceedings are sought to be reviewed to make a return thereof. Therefore, a fact stated in such return may be material, and, if the return in respect to it is false and injurious to the party against whom it was made, he may maintain an action for the damages suffered thereby.

Charles E. Snyder, for the appellants.

Edward A. Brown, for the respondent.

163 BARTLETT, J. This is an appeal from the general term, fourth department, affirming a nonsuit at circuit.

This action is brought to recover damages for a false return to a writ of *certiorari* made by the defendant when acting as highway commissioner of the town of Manheim, Herkimer county. The plaintiffs claim that the defendant, as such highway commissioner, made an order, without jurisdiction, locating a highway, as altered, through their barnyard, the center line being twenty-five feet from the barn. The plaintiffs applied for a writ of *certiorari* on the ground that it appeared "upon the face of said proceedings" that the highway was located through their barnyard. The writ issued commanding the defendant to return the proceedings with all things appertaining thereto. The defendant, as such highway commissioner, made return to the writ, attaching thereto all the proceedings in altering and locating the highway, and stating "that none of said alteration and highway proposed passes through the buildings or barnyard of Helen C. Beardslee and Guy R. Beardslee, nor do they pass through any yards of the said Beardslees."

The general term affirmed the proceedings (*People v. Dolge*, 45 Hun, 310), and this court affirmed without an opinion (110 N. Y. 680). This disposition of the proceeding was due to the fact that the language of the return, already quoted, was held an answer to plaintiffs' contention that the highway ran through their barnyard. The hearing was upon the writ and the return, the appellate courts holding the latter conclusive. The plaintiffs subsequently obtained a perpetual injunction against defendants' successor in office prohibiting the opening of the highway. Later, this action to recover damages for the false return was brought, and two trials have been had. At the first trial the plaintiffs recovered a verdict, but the general term reversed the judgment. At the second trial

plaintiffs were nonsuited; the general term affirmed the judgment and the present appeal was taken.

At the last trial the plaintiffs offered to prove that the statement in the return that the highway did not pass through ¹⁶⁴ their barnyard was not true, and that they were damaged in the amount stated in the complaint. The court refused to receive the evidence, and, for the purposes of this appeal, the facts stated in the offer of proof must be taken as true: *Rehberg v. Mayor etc.*, 91 N. Y. 137-141; 43 Am. Rep. 657; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389.

The learned general term seems to have proceeded upon the theory that the *certiorari* proceeding was final, determined the rights of all parties, and that the adjudication cannot be attacked collaterally in this action. This court, having heard the *certiorari* proceeding on the writ and return, and having no authority to look into the facts, made a proper disposition of the matter upon the record as it then stood, but there is nothing in the decision of that appeal which prevents the plaintiffs from showing that the defendant, as a highway commissioner, acted without jurisdiction and made a false return when he stated that the proposed highway did not run through the barnyard of the plaintiffs. Highway commissioners, in laying out a highway, exercise a special and limited jurisdiction, and although it may be presumed, until the contrary appears, that they have acted legally, it is quite clear their acts may be impeached by showing that they exceeded their powers: *Ex parte Clapper*, 3 Hill, 460; *Cagwin v. Hancock*, 84 N. Y. 532. Without the consent of the owner no road can be laid out "through any buildings, or any fixtures or erection for the purposes of trade or manufactures, or any yards or inclosures necessary for the use and enjoyment thereof": 1 Rev. Stats. 514, sec. 57; Rev. Stats., 8th ed., p. 1372, sec. 57. The statute expressly deprives the commissioners of jurisdiction where the road passes through a yard, and provides for a proceeding before the county judge to be confirmed by the general term of the supreme court.

It has been held that commissioners laying out a highway through a yard, etc., were liable to the owner in trespass: *Clark v. Phelps*, 4 Cow. 190. This case proceeds upon the theory that commissioners acted wholly without jurisdiction: *People v. Goodwin*, 5 N. Y. 571. A commissioner of ¹⁶⁵ highways is not a judicial officer in the sense that he is en-

titled to the common-law protection against a civil action for his misconduct in office: *People v. Wheeler*, 21 N. Y. 82. When called upon to make his return to the writ of *certiorari* he acts as a ministerial officer. It is an established rule in this state that where an individual sustains an injury by misfeasance or nonfeasance of a public officer, who acts contrary to, or omits to act in accordance with, his duty, an action lies against such officer by the party injured: *Bryant v. Town of Randolph*, 138 N. Y. 75; *Adsit v. Brady*, 4 Hill, 630; 40 Am. Dec. 305; *Houghton v. Swarthout*, 1 Denio, 589; *Hoter v. Barkhoof*, 44 N. Y. 113; *Clark v. Miller*, 54 N. Y. 528; *Wilson v. Mayor etc.*, 1 Denio, 595, 599; 43 Am. Dec. 719; *Rex v. Lyme Regis*, 1 Doug. 149; *Rector v. Clark*, 78 N. Y. 21.

The official determination of the defendant as to the fact upon which his power to act depended is not conclusive, and, if the fact does not exist, his decision that it did does not establish jurisdiction: *Matter of New York Catholic Protectory*, 77 N. Y. 342; *Dorn v. Backer*, 61 N. Y. 261. Where there is a want of authority to hear and determine the subject matter of the controversy an adjudication upon the merits is a nullity, and does not estop even an assenting party: *Matter of Will of Walker*, 136 N. Y. 20-29.

The present action is in the nature of a collateral attack upon the proceedings of the defendant as highway commissioner for want of jurisdiction. Such an attack can be made upon any judgment where there is no jurisdiction: *Ferguson v. Crawford*, 70 N. Y. 253; 26 Am. Rep. 589; *Chemung Canal Bank v. Judson*, 8 N. Y. 254; Freeman on Judgments, sec. 120.

If the plaintiffs shall succeed in proving their case the proceedings must be held void and the return to the writ of *certiorari* not true.

It is not necessary to impute corrupt motives to defendant; a mistake as to his duty and honest intentions on his part would still leave him liable: *Houghton v. Swarthout*, 1 Denio, 589; *Amy v. Supervisors*, 11 Wall. 136.

It is argued by the appellants here that the decision in the ¹⁰⁰ *certiorari* proceeding would have been the other way if the defendant had not stated in his return that the highway did not pass through the barnyard of plaintiffs, as the return showed that the center line of the highway three rods wide was twenty-five feet from plaintiffs' barn, and would carry the outer line to within three inches of it. On the other hand the general term suggested that the statement

of defendant, in his return, that the highway did not run through the barnyard of plaintiffs, might be regarded as nothing more than a declaration that, in the proceeding before him, as commissioner, he held that the contemplated highway did not run through the barnyard; or, if it could not bear this construction, it was irrelevant, and should be disregarded.

We do not think this statement in the return can be treated as irrelevant, as it appears to have exercised a controlling effect in the determination of the *certiorari* proceeding. The general term, writing in that proceeding, say: "The relators further claim that the action of the commissioner should be reversed, because the proposed road runs through the barnyard of the relators. The language of the return is an answer to such claim. It says: 'That none of said alteration and highway passes through the buildings or barnyard of the relators, nor do they pass through any yard of the said Beardslees': *People v. Dolge*, 45 Hun, 312.

The respondent has referred us to cases holding that a common-law *certiorari* to an inferior tribunal removes only the record, and if the return contains any thing more it will be disregarded *pro tanto*.

This rule of the common law which treated the writ of *certiorari* as analogous to a writ of error has no application to our present statutory proceeding where the writ of *certiorari* cannot issue to review a determination in a civil action or special proceeding by a court of record, or a judge of a court of record: Code, sec. 2121. The office of the writ is to compel the body or officer whose proceedings are under review to make a return of the proceedings, and a statement of the other matters specified in and required by the writ: Code, ¹⁶⁷ sec. 2134. The Code of Civil Procedure, in providing what questions are to be determined upon the return of the writ, names first jurisdiction of the subject matter: Code Civ. Proc., sec. 2140.

In the matter at bar the writ in the *certiorari* proceeding commanded the defendant to certify and return his proceedings "with all things appertaining thereto," and we are of opinion that his declaration in the return, that the highway did not pass through the barnyard, was material, and made in obedience to the writ, exercised a controlling influence in that proceeding, and he is liable in this action if, after due trial

of the issues, it proves to have been false and the plaintiffs damaged thereby.

The judgment should be reversed, with costs to abide the event.

All concur, except ANDREWS, C. J., not sitting.

Judgment reversed.

ROAD COMMISSIONERS ACT JUDICIALLY in road matters, and their judgments, while acting within their jurisdiction, cannot be collaterally attacked: *Longfellow v. Quimby*, 29 Me. 196; 48 Am. Dec. 525. But, as to what questions are judicial when sought to be reviewed on *certiorari*, compare note to *Wulsen v. Board of Supervisors*, 40 Am. St. Rep. 36-38.

JUDGMENT OF A COURT ACTING WITHOUT JURISDICTION IS A NULLITY: See *Town of Wayne v. Caldwell*, 1 S. Dak. 483; 36 Am. St. Rep. 750, and note.

JURISDICTION CANNOT BE CONFERRED BY CONSENT where it does not exist at law: See *Town of Wayne v. Caldwell*, 1 S. Dak. 483; 36 Am. St. Rep. 750, and note.

COLLATERAL ATTACK UPON JUDGMENT, WHAT IS: *Cully v. Shirk*, 131 Ind. 76; 31 Am. St. Rep. 414.

CERTIORARI ISSUES ONLY TO INFERIOR TRIBUNALS: See *In re Saline County Subscription*, 45 Mo. 52; 100 Am. Dec. 337. It is the proper remedy to review the legality of the acts of road commissioners: *Longfellow v. Quimby*, 29 Me. 196; 48 Am. Dec. 525; but error not apparent in the proceedings in a road case cannot be reviewed on this writ: *Case of Philadelphia etc. R. R. Co.*, 6 Whart. 25; 36 Am. Dec. 202.

CERTIORARI.—QUESTIONS REVIEWABLE UPON: See monographic note to *Wulsen v. Board of Supervisors*, 40 Am. St. Rep. 29-46.

PUBLIC OFFICERS.—LIABILITY OF, for negligence, acts beyond the scope of their authority, or misfeasance or nonfeasance in office: See *Bailey v. Mayor*, 3 Hill, 531; 38 Am. Dec. 669; *Wilson v. Mayor*, 1 Denio, 595; 43 Am. Dec. 719. Public officers acting ministerially are liable for nonfeasance and misfeasance: See monographic note to *Robinson v. Chamberlain*, 90 Am. Dec. 730-732; *Wilson v. Mayor*, 1 Denio, 595; 43 Am. Dec. 719.

LOUGH v. OUTERBRIDGE.

[143 NEW YORK, 271.]

A COMMON CARRIER IS SUBJECT TO AN ACTION FOR DAMAGES FOR REFUSING TO PERFORM ITS DUTIES to the public for a reasonable compensation, or to recover back moneys paid when its charges are excessive.

EQUITY PRACTICE, DEFENSE AT LAW.—If one sued in equity wishes to avail himself of a defense that an adequate remedy exists at law he must plead it.

APPELLATE PROCEDURE, WAIVER OF OBJECTIONS.—If the facts established under the pleadings are sufficient to entitle plaintiff to relief in some form of action, and no objection is made by the defendant to his plead-

ings or at the trial, it is too late on appeal to urge an objection which does not touch the merits, but relates wholly to the form in which the plaintiff has presented the facts and demanded relief, or to the practice and procedure only.

CARRIERS.—THE DUTIES AND OBLIGATIONS OF CARRIERS MAY BE ENFORCED through the courts and the legislative power.

A COMMON CARRIER HAS NO RIGHT TO EXACT from any one any thing that is not reasonable and just, nor to discriminate in favor of one against another, where the conditions and circumstances are the same.

CARRIERS.—CHARGES OFFERED TO DESTROY COMPETITION.—IF A COMMON CARRIER OFFERS TO CARRY GOODS at a time designated by it at a reduced price, on condition that its customers do not at that time ship any freight by any other line, and to those customers who refuse to agree to give it their exclusive business during such time charges its usual rates, it is not, if the rates charged are just, under the obligation to carry at the reduced rate for those who refuse to assent to the condition upon which those rates are offered.

A CARRIER MAY LAWFULLY DEPART FROM THE STANDARD OR USUAL RATES if such rates are reasonable, and the deviation is in favor of particular customers for special reasons not applicable to the whole public. Special offers in the form of reduced rates to particular customers may form an element in the inquiry, whether, as a matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public that fact must be taken into account in ascertaining whether the tariff of general prices is or is not reasonable.

A CARRIER MAY GIVE REDUCED RATES TO CUSTOMERS STIPULATING TO GIVE IT ALL THEIR BUSINESS, and refuse those rates to others who are not able or willing to so stipulate, provided the charges exacted from those not joining in the stipulation are not excessive or unreasonable. The fact that an offer of reduced rates was made to prevent or drive away competition is not material if such competition is irregular and partial, and the rates charged in the absence of competition are reasonable.

CARRIER'S LAWFUL ACTS TO RETAIN MONOPOLY OF BUSINESS.—Carriers who have a substantial monopoly of business may lawfully seek to retain their business by offering their services to the public at a loss to themselves whenever competition is to be met, and, when it disappears, resuming their standard rates, if such rates are reasonable and just.

Treadwell Cleveland, for the appellants.

Wilhelmus Mynderse, for the respondents.

273 O'BRIEN, J. The question presented by this appeal is one of very great importance. It touches commerce, and, more especially, the duties and obligations of common carriers to the public at many points. There was no dispute at the trial, and there is none now with respect to the facts upon which it arises. In order to present the question clearly a brief statement of these facts becomes necessary. The plaintiffs are the surviving members of a firm that, for many years prior

to the transaction upon which the action was based, had been engaged in business as commission merchants in the city of New York, transacting their business mainly with the Windward and Leeward islands. The defendant, the Quebec Steamship Company, is a Canadian corporation, organized and existing under the laws of Canada, and the other defendants are the agents of the corporation in New York, doing business as partners. The business of the corporation is that of a common carrier, transporting passengers and freight for hire upon the sea and adjacent waters. For nearly twenty years ¹⁸⁷⁴ prior to the transaction in question a part of its business was the transportation of cargoes between New York and the Barbadoes and the Windward islands, the other defendants acting as agents in respect to this business. During some years prior to the commencement of this action the company had in its service a fleet of five or six of the highest class iron steamers, sailing at intervals of about ten days from New York to the islands, each steamer requiring about six weeks to make the trip. The steamers were kept constantly engaged in this service, and sailed regularly upon schedule days without reference to the amount of cargo then received. The regular and standard rate charged for freight up to December, 1891, from New York to Barbadoes, one of the Windward islands, was fifty cents per dry barrel of five cubic feet, which was taken as the unit of measurement, and the tariff of charges was adjusted accordingly for goods shipped in other forms and packages. In December, 1891, the regular rate was reduced from fifty to forty cents per dry barrel. About this time the British steamer *El Callao*, which had for some years before sailed between New York to Ciudad Bolivar in South America, transporting passengers and freight between these points, began to take cargo at New York for Barbadoes, and sometimes to other points in the Windward Islands which she passed on her regular trips to Ciudad Bolivar, sailing from New York at intervals of five or six weeks. Her trade with South America was the principal feature of her business, but such space as was not required for the cargo destined for the end of the route was filled with cargo for the islands which lay in her regular course.

The defendants evidently regarded this vessel as a somewhat dangerous competitor for a part of the business, the benefits of which they had up to this time enjoyed, and, for

the purpose of retaining it, they adopted the plan of offering special reduced rates of twenty-five cents per dry barrel to all merchants and business men in New York who would agree to ship by their line exclusively during the week that the *El Callao* was engaged in obtaining freight and taking on cargo. 275 The plaintiffs' firm had business arrangements with and were shipping by that vessel, and in February, 1892, they demanded of the defendants that they receive three thousand barrels of freight from New York to Barbadoes and transport the same at the special rate of twenty-five cents per barrel upon one of its steamers. The defendants then informed the plaintiffs that the rate of twenty-five cents was allowed by them only to such shippers as stipulated to give all their business exclusively to the defendants' line, in preference to the *El Callao*, and that to all other shippers the standard rate of forty cents per dry barrel was maintained. But they further informed the plaintiffs that, if they would agree to give their shipments for that week exclusively to the defendants' line, the goods would be received at the twenty-five cent rate. The plaintiffs, however, were shipping by the other vessel, and declined this offer. Again, in the month of May, 1892, the *El Callao* was in the port of New York taking on cargo, as was also the defendants' steamer *Trinidad*. The plaintiffs then demanded of the defendants that they receive and carry from New York to Barbadoes about seventeen hundred and sixty dry barrels of freight at the rate of twenty-five cents. The defendants notified the plaintiffs that a general offer had that day been made by them to the trade to take cargo for Barbadoes on the *Trinidad*, to sail on June 4th, at twenty-five cents per dry barrel, under an agreement that shippers accepting that rate should bind themselves not to ship to that point by steamers of any other line between that date and the sailing of the *Trinidad*. The defendants offered these terms to the plaintiffs, but, as they were shipping by the rival vessel, the offer was declined. Except during the week when the *El Callao* was engaged in taking on cargo the defendants have maintained the regular rate of forty cents to all shippers between these points, and, when it reduced the rate as above described, exactly the same rates, terms, and conditions were offered to all shippers, including the plaintiffs, and they carried freight for other parties at the reduced rates, only upon their entering into a stipulation not to ship by the rival vessel. After the plain-

tiffs' demand ²⁷⁶ last mentioned had been refused they obtained an order from one of the judges of the court in this action requiring the defendants to carry the seventeen hundred and sixty barrels, and the defendants did receive and transport them, in obedience to the order, at the rate of twenty-five cents, but this order was reversed at general term. The plaintiffs demand equitable relief in the action to the effect, substantially, that the defendants be required and compelled by the judgment of the court to receive and transport for the plaintiffs their freight at the special reduced rates, when allowed to all other shippers, without imposing the condition that the plaintiffs stipulate to ship during the times specified by the defendants' line exclusively.

Whether the regular rate of forty cents, for which it is conceded that the defendants offered to carry for the plaintiffs at all times without conditions, was or was not reasonable, was a question of fact to be determined upon the evidence at the trial, and the learned trial judge has found, as matter of fact, that it was reasonable, and that the reduced rate of twenty-five cents granted to shippers on special occasions, and upon the conditions and requirements mentioned, was not profitable. This finding, which stands unquestioned upon the record, seems to me to be an element of great importance in the case which must be recognized at every stage of the investigation.

A common carrier is subject to an action at law for damages in case of refusal to perform its duties to the public for a reasonable compensation, or to recover back the money paid when the charge is excessive.

This right to maintain an action at law upon the facts alleged, it is urged by the learned counsel for the defendants, precludes the plaintiffs from maintaining a suit for equitable relief such as is demanded in the complaint. There is authority in other jurisdictions to sustain the practice adopted by the plaintiffs (*Watson v. Sutherland*, 5 Wall. 74; *Menacho v. Ward*, 27 Fed. Rep. 529; *Toledo etc. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 741; *Coe v. Louisville etc. R. R. Co.*, 3 Fed. Rep. 775; *Vincent v. Chicago etc. R. R. Co.*, 49 Ill. 33; *Scofield v. Lake Shore etc. Ry. Co.*, 43 Ohio St. 571; 54 Am. Rep. 846), though I am not aware of any in this state that would bring a case based upon such facts within the usual or ²⁷⁷ ordinary jurisdiction of equity. So far as this case is concerned it is sufficient to observe that it is now settled by a very general

concurrence of authority that a defendant cannot, when sued in equity, avail himself of the defense that an adequate remedy at law exists unless he pleads that defense in his answer: *Cogswell v. New York etc. R. R. Co.*, 105 N. Y. 319; *Town of Mentz v. Cook*, 108 N. Y. 504; *Ostrander v. Weber*, 114 N. Y. 95; *Dudley v. Congregation St. Francis*, 138 N. Y. 460; *Truscott v. King*, 6 N. Y. 147.

When the facts alleged are sufficient to entitle the plaintiff to relief in some form of action, and no objection has been made by the defendant to the form of the action in his answer or at the trial, it is too late to raise the point after judgment or upon appeal. So that, whatever objections might have been urged originally against the action in its present form, the defendants must now be deemed to have waived them. This court will not stop to examine a minor question that does not touch the merits, but relates wholly to the form in which the plaintiffs have presented the facts and demanded relief, or to the practice and procedure. The time and place to raise and discuss these questions was at or before the trial, and, as they were not then raised, the case must be examined and disposed of upon the merits.

The defendants were engaged in a business in which the public were interested, and the duties and obligations growing out of it may be enforced through the courts and the legislative power: *Munn v. Illinois*, 94 U. S. 113; *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460. In England these duties are, to a great extent, regulated by the Railway and Canal Traffic Act (17 & 18 Vict., ch. 31), and by statute in some of the states, and in this country, so far as they enter into the business of interstate commerce, by act of Congress. The solution of the question now presented depends upon the general principles of the common law, as there is no statute in this state that affects the question, and the legislation referred to is important only for the purpose of indicating the extent to which business of this character has been subjected to public regulation for the ²⁷⁸ general good. There can be no doubt that at common law a common carrier undertook generally, and not as a casual occupation, to convey and deliver goods for a reasonable compensation as a business, with or without a special agreement, and for all people indifferently, and, in the absence of a special agreement, he was bound to treat all alike in the sense that he was not permitted to charge any one an excessive price for the services. He has no right in

any case, while engaged in this public employment, to exact from any one any thing beyond what, under the circumstances, is reasonable and just: 2 Kent's Commentaries, 13th ed., 598; Story on Bailments, secs. 495, 508; 2 Parsons on Contracts, 175; *Killmer v. New York Cent. etc. R. R. Co.*, 100 N. Y. 395; 53 Am. Rep. 194; *Root v. Long Island R. R. Co.*, 114 N. Y. 300; 11 Am. St. Rep. 648. It may also be conceded that the carrier cannot unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same. The question in this case is whether the defendants, upon the undisputed facts contained in the record, have discharged these obligations to the plaintiffs. There was no refusal to carry for a reasonable compensation. On the contrary the defendants offered to transport the goods for the forty cents rate, and we are concluded by the finding as to the reasonable nature of that charge. The defendants even offered to carry them at the unprofitable rate of twenty-five cents, providing the plaintiffs would comply with the same conditions upon which the goods of any other person were carried at that rate. What is reasonable and just in a common carrier in a given case is a complex question into which enters many elements for consideration. The questions of time, place, distance, facilities, quantity, and character of the goods, and many other matters, must be considered. The carrier can afford to carry ten thousand tons of coal or other property to a given place for less compensation per ton than he could carry fifty, and, where the business is of great magnitude, a rebate from the standard rate might be just and reasonable, while it could not fairly be granted to another who desired to have a trifling amount of goods carried to the same point. So long as the ²⁷⁹ regular standard rates maintained by the carrier and offered to all are reasonable, one shipper cannot complain because his neighbor, by reason of special circumstances and conditions, can make it an object for the carrier to give him reduced rates. In this case the finding implies that the defendants, at certain times, carried goods at a loss upon the condition that the shippers gave them all of their business. Whatever effect may be given to the legislation referred to, in its application to railroads and other corporations deriving their powers and franchises from the state, there can be no doubt that the carrier could, at common law, make a discount from its reasonable general rates in favor of a particular customer or class of cus-

tomers in isolated cases for special reasons, and upon special conditions, without violating any of the duties or obligations to the public inherent in the employment. If the general rates are reasonable a deviation from the standard by the carrier in favor of particular customers, for special reasons, not applicable to the whole public, does not furnish the parties not similarly situated any just ground for complaint. When the conditions and circumstances are identical the charges to all shippers for the same service must be equal. These principles are well settled, and whatever may be found to the contrary, in the cases cited by the learned counsel for the plaintiff, originated in the application of statutory regulations in other states and countries: *Fitchburg R. R. Co. v. Gage*, 12 Gray, 379; *Sargent v. Boston etc. R. R. Corp.*, 115 Mass. 422; *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. D. 544; affirmed 23 Q. B. D. 598, and by H. L. 17 App. Cas. 25; *Evershed v. London etc. Ry. Co.*, L. R. 8 Q. B. D. 135; *Baxendale v. Eastern Counties R. Co.*, 4 Com. B., N. S., 78; *Branley v. Southeastern Ry. Co.*, 12 Com. B., N. S., 74.

Special favors in the form of reduced rates to particular customers may form an element in the inquiry whether, as matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public the fact must be taken into account in ascertaining whether a given tariff of general prices is or is not ~~so~~ reasonable. But, as in this case, the reasonable nature of the price for which the defendants offered to carry the plaintiffs' goods has been settled by the findings of the trial court, it wil' not be profitable to consider further the propriety or effect of such discrimination. The rule of the common law was thus broadly stated by the supreme court of Massachusetts in the case of the *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393. Upon that point the court said: "The recent English cases, cited by the counsel for the defendants, are chiefly commentaries upon the special legislation of parliament regulating the transportation of freight on railroads constructed under the authority of the government there; and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon these subjects. The principle derived from that source is very simple. It requires equal justice to all. But the equality which is to be observed consists in the re-

stricted right to charge a reasonable compensation and no more. If the carrier confines himself to this no wrong can be done. If, for special reasons in isolated cases, the carrier sees fit to stipulate for the carriage of goods of any class for individuals, for a certain time, or in certain quantities, for a less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without entitling all parties to the same advantage."

In *Evershed v. London etc. Ry. Co.*, L. R. 3 Q. B. D. 135, Lord Bramwell remarked: "I am not going to lay down a precise rule, but, speaking generally, and subject to qualification, it is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other, though that other may not be in a situation to make it. An obvious illustration may be found in season tickets." The authorities cited seem to me to remove all doubt as to the right of a carrier, by special agreement, to give reduced rates to customers who stipulate to give them all their business, and to refuse these rates to others who are not able or willing to ²⁸¹ so stipulate, providing always that the charge exacted from such parties for the service is not excessive or unreasonable. The principle of equality to all, so earnestly contended for by the learned counsel for the plaintiffs, was not, therefore, violated by the defendants, since they were willing, and offered, to carry the plaintiffs' goods at the reduced rate, upon the same terms and conditions that these rates were granted to others, and if the plaintiffs were unable to get the benefit of such rate it was because, for some reason, they were unable or unwilling to comply with the conditions upon which it was given to their neighbors, and not because the carrier disregarded his duties or obligations to the public. The case of *Menacho v. Ward*, 27 Fed. Rep. 529, does not apply, because the facts were radically different. That action was to restrain the carrier from exacting unreasonable charges habitually for services, the charges having been advanced as to the parties complaining for the reason that they had at times employed another line. It decides nothing contrary to the general views here stated. On the contrary the court expressly recognized the general rule of the common law with respect to the obligations and duties of the carrier substantially as it is herein expressed, as will be seen from the following paragraph in the opinion of Judge Wallace:

“Unquestionably a common carrier is always entitled to a reasonable compensation for his services. Hence, it follows that he is not required to treat all those who patronize him with absolute equality. It is his privilege to charge less than a fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. Respecting preference in rates of compensation, his obligation is to charge no more than a fair return in each particular transaction, and, except as thus restricted, he is free to discriminate at pleasure. This is the equal justice to all which the law exacts from the common carrier in his relations with the public.”

But it is urged that the plaintiffs were in fact the only shippers of goods from New York to Barbadoes by the *El Callao*, and, therefore, the condition imposed that the reduced rate should be granted only to such merchants as stipulated to give the defendants their entire business, while in terms imposed upon the public generally, was in fact aimed at the plaintiffs alone. The trial court refused to find this fact, but, assuming that it appeared from the undisputed evidence, I am unable to see how it could affect the result. The significance which the learned counsel for the plaintiffs seems to give to it in his argument is, that it conclusively shows the purpose of the defendants to compel the plaintiffs to withdraw their patronage from the other line, to suppress competition in the business, and to retain a monopoly for their own benefit. Conceding that such was the purpose, it is not apparent how any obligation that the defendants owed to the public was disregarded. We have seen that the defendants might lawfully give reduced rates in special cases to particular customers and refuse them in others where the conditions are different, or to the general public where the regular rates are reasonable. The purpose of an act which in itself is perfectly lawful or, under all the circumstances, reasonable, is seldom, if ever, material: *Phelps v. Nowlen*, 72 N. Y. 89; 28 Am. Rep. 93; *Kiff v. Youmans*, 86 N. Y. 324; 40 Am. Rep. 543. The mere fact that the transportation business between the two points in question was in the hands of the defendants did not necessarily create a monopoly, if the general rates maintained were reasonable and just. It is not pretended that the owners of the *El Callao* proposed to give regular service to the general public for any less. When the service is performed for a reasonable and just hire the

public have no interest in the question, whether one or many are engaged in it. The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest, and to the detriment of the public, by exacting unreasonable charges. But when an individual or a corporation has established a business of a special and limited character, such as the defendants in this case had, they have a right to retain it by the use of all lawful means. That was ²⁸³ what the defendants attempted to do against a competitor that engaged in it, not regularly or permanently, but incidentally and occasionally. The means adopted for this purpose was to offer the service to the public at a loss to themselves whenever the competition was to be met, and when it disappeared to resume the standard rates, which, upon the record, did not at any time exceed a reasonable and fair charge. I cannot perceive any thing unlawful or against the public good in seeking by such means to retain a business which it does not appear was of sufficient magnitude to furnish employment for both lines. On this branch of the argument the remarks of Lord Coleridge in the case of the *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. D. 544, are applicable: "The defendants are traders with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a right to push their lawful trades by all lawful means. They have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them rather than with their rivals. It follows that they may, if they see fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted by those who withdraw them on the customers who decline to deal exclusively with them, dealing with other traders."

The courts, I admit, should do nothing to lessen or weaken the restraints which the law imposes upon the carrier, or in any degree to impair his obligation to serve all persons indifferently in his calling, in the absence of a reasonable excuse,

and for a reasonable compensation only. But to hold, as we are asked to in this case, that the plaintiffs were entitled to have their goods carried by the defendants at an unprofitable rate without compliance with the conditions upon which it was ²⁸⁴ granted to all others, and which constituted the motive and inducement for the offer, would be extending these obligations beyond the scope of any established precedent based upon the doctrine of the common law, and would, I think, be contrary to reason and justice.

The judgment of the court below dismissing the complaint was right, and should be affirmed with costs.

FINCH, GRAY, and BARTLETT, JJ., concur; PECKHAM, J., dissents.

Judgment affirmed. —

CARRIERS.—DUTY TO CARRY: See *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278, and note.

CARRIERS—COMMON-LAW RIGHT OF DISCRIMINATION.—At common law a common carrier is bound to accept and carry goods for all upon being paid a reasonable compensation, but he is under no obligation to treat all customers equally, and he may carry for favored individuals at an unreasonably low rate, or even *gratis*. The fact that he charges less for one than another is only evidence that a particular charge is unreasonable, and the difference between the charges cannot be made the measure of damages in any case, unless it is proved that the smaller charge is the true reasonable charge, and that the higher charge is excessive to that degree: *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470; 28 Am. St. Rep. 142; note to *Schofield v. Railway Co.*, 54 Am. Rep. 863. As to evidence that the amount charged is unreasonable, see *Cook v. Chicago etc. Ry. Co.*, 81 Iowa, 551; 25 Am. St. Rep. 512.

REMEDY AT LAW—ESTOPPEL.—The mere fact that one has a remedy at law is not enough to bar him from proceeding in equity, even when the question is properly raised by the pleadings, unless such remedy is an adequate remedy: *Pierstoff v. Jorge*, 86 Wis. 128; 39 Am. St. Rep. 881, and note. Equity will not grant relief from a judgment on the ground that plaintiff had a defense to the action at law which he failed to plead, in the absence of fraud or mistake of fact by which he was prevented from interposing it: *Carney v. Marseilles*, 136 Ill. 401; 29 Am. St. Rep. 328.

CARRIERS—RAILROADS—REGULATION OF FREIGHTS AND FARES.—POWERS OF LEGISLATURE AND COMMISSIONS: See *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278, and note.

CARRIERS—DISCRIMINATION.—ACTIONS AGAINST FOR VIOLATION OF DUTY AS TO CARRIAGE: *Avinger v. South Carolina Ry. Co.*, 29 S. C. 265; 13 Am. St. Rep. 716; *Hoover v. Pennsylvania R. R.*, 156 Pa. St. 220; 36 Am. St. Rep. 43.

CARRIERS.—DISCRIMINATION BY RAILWAYS, WHAT ARE UNREASONABLE AND UNLAWFUL: See monographic note to *Root v. Long Island R. R. Co.*, 11 Am. St. Rep. 647-655.

CARRIERS—CONTRACTS FOR REBATES.—VALIDITY OF: See *National Dia. Co. v. Cream City Imp. Co.*, 86 Wis. 352; 39 Am. St. Rep. 902, and note; *Cook v. Chicago etc. Ry. Co.*, 81 Iowa, 551; 25 Am. St. Rep. 512, and note.

CARRIERS.—CANNOT DISCRIMINATE BETWEEN THEIR CUSTOMERS in charges for freight where the conditions are equal: See note to *Hoover v. Pennsylvania R. R.*, 36 Am. St. Rep. 63; *Cook v. Chicago etc. Ry. Co.*, 81 Iowa, 551; 25 Am. St. Rep. 512, and note.

CARRIERS.—A SHIPPER WHO HAS BEEN OVERCHARGED may recover back the excess: See note to *Brundred v. Rice*, 34 Am. St. Rep. 594; *Cook v. Chicago etc. Ry. Co.*, 81 Iowa, 551; 25 Am. St. Rep. 512, and note.

APPEAL.—OBJECTION NOT MADE IN TRIAL COURT will not be considered on appeal: *Coad v. Home Cattle Co.*, 32 Neb. 761; 29 Am. St. Rep. 465; but is deemed to have been waived: *Fleming v. Springfield*, 154 Mass. 520; 26 Am. St. Rep. 268.

NEGUS v. BECKER.

[143 NEW YORK, 303.]

PARTY WALLS—DAMAGES FOR FALL OF.—One who increases the height of a party, wall which had been constructed under an agreement giving him a right so to do, is not liable for its falling upon and injuring the adjacent premises, if he was not negligent, though he built such wall without the consent or knowledge of the owner of the adjacent premises. The owner having a right to add to such a wall is not an insurer of the safety of the operation, nor answerable for resulting damages, unless guilty of negligence.

ACTION to recover damages for injury resulting to plaintiff by the falling of a brick wall. This wall had originally been constructed under and pursuant to an agreement between plaintiff and one Krieger, who was then the owner of the adjacent property. This agreement provided that the wall should be of suitable size and dimensions to support a three-story brick building. Plaintiff first constructed a two-story building, and Krieger paid one-third of the cost thereof, and subsequently conveyed his interest in the lot to the defendants. They made a contract in writing with one Robinson to erect a brick building on their lot, three stories in height, and in so doing to make use of the party wall between their lands and those of the plaintiff. While this wall was in progress of construction part of it fell upon the roof of plaintiff's building to his damage. The complaint did not charge any negligence on the part of the defendants or of the contractor, but did aver that the acts done in extending the wall and carrying it up another story in height had been done "without the knowledge or consent of the plaintiff." There

was not at the trial any evidence of negligence upon the part either of the defendants or of their contractor, Robinson. A motion for a nonsuit was denied, and the jury were directed to return a verdict in favor of the plaintiff for the amount of the damages proved. A judgment entered accordingly was affirmed by the general term, and an appeal was prosecuted thence to the court of appeals.

William H. Henderson, for the appellants.

Hudson Ansley, for the respondent.

306 GRAY, J. The direction of a verdict for the plaintiff proceeded upon the theory that, in undertaking to have the party wall carried up, in order to provide for the third story of their building, the defendants assumed an unqualified liability to the plaintiff for any occurrence in the course of construction, resulting in injury to him. There is no charge in the complaint, and there was no evidence to show, that the erection of this wall was something intrinsically dangerous, and, therefore, a matter which imposed upon the defendants a responsibility, in case of resulting damage to their neighbor, from which they 307 could not escape by any plea. The gravamen of the complaint seems to be in the proposition that, because the defendants extended the party wall to the full depth of the boundary line and carried it higher up, without the plaintiff's knowledge or consent, they did so at their peril, and became absolutely liable, or insurers, for all possible injurious results. In the opinion of the general term, upon the authority of *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545, and of *Schile v. Brokhahus*, 80 N. Y. 619, it was held that it was unnecessary for the claim in the complaint to be based upon negligence; that, while the defendants had the right to use the wall as they did, they "insured the safety of the operation." "The party making the change," it was said, "is absolutely responsible for any damage which it occasions." We cannot agree with the court below in their view of the question, or that it is controlled by the authorities cited. *Schile v. Brokhahus*, 80 N. Y. 619, was an action for trespass, in tearing down a portion of a partition wall, and it was tried upon the theory, as Chief Judge Church stated, "that the defendant, in disregard of the plaintiff's rights, commenced to tear down the old wall, claiming that it stood entirely upon his own land, and intending to erect a

negligent act of commission, or of omission, in the process of construction, it is very clear that the party liable for the resulting damage would be the contractor. By the contract between him and these defendants he undertook to construct the wall. It was not a matter which the defendants were competent to engage in, and, in contracting with Robinson, they placed themselves in a position which exonerated them from ³¹⁰ any responsibility for a negligent performance of the work. The performance of the work contracted for was neither dangerous nor extraordinary in itself and hence the rule would apply that for an injury resulting to another, by reason of a negligent performance, the remedy would be solely against the contractor. The owner was innocent of any act contributing to the injury. We have lately discussed this doctrine in *Engel v. Eureka Club*, 137 N. Y. 100; 33 Am. St. Rep. 692. But, as it has been already observed, no negligence is charged, and the case was left to stand upon the sole proposition that, however innocent the defendants of causing the occurrence, and however lawful their undertaking to build up the party wall, they must, nevertheless, be responsible for what happened. This cannot be, and is not, correct doctrine. If the fall of the wall was through some negligence in its construction, or in securing it, the liability was the contractor's and not the property owner's. If there was no such negligence, and the fall was occasioned through some accident, as, for instance, by the extraordinary force of the storm, which is mentioned, the defendants were not responsible. If, in the lawful use of one's property, injury is occasioned to an adjacent owner, which the exercise of due care could not have prevented, there is no remedy. An illustration of this rule is presented by cases of the excavation of land, which deprive adjoining premises of lateral support: *Lasala v. Holbrook*, 4 Paige, 170; 25 Am. Dec. 524; or, more recently, by the case of *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552, where the damage was caused by blasting.

Here there was damage, admittedly; but there was no wrong. As the complaint was framed, and as the case was tried, the fall of the wall was not laid to the fault of the defendants or of their contractor, and, upon such a case, plaintiff should have been nonsuited.

It is our judgment that the judgments below should be reversed, and that a judgment should be entered in favor of

the defendants, dismissing the complaint, with costs in all the courts to the appellants.

All concur, except ANDREWS, C. J., not sitting.

Judgment accordingly. —

PARTY WALLS—RIGHT TO INCREASE.—Either owner of a party wall may increase the dimensions of the same, or any of them, if he can do so without injury to the other part: *Andrae v. Haseltine*, 58 Wis. 395; 46 Am. Rep. 635; *Dauenhauer v. Devine*, 51 Tex. 480; 32 Am. Rep. 627; *Everett v. Edwards*, 149 Mass. 588; 14 Am. St. Rep. 462, and note; but the party making the addition does so at his peril, and if injury results he is liable for all damages: *Brooks v. Curtis*, 50 N. Y. 639; 10 Am. Rep. 545. Where a party wall is erected one-half on the land of each adjoining proprietor, they do not own it as tenants in common, but each is the owner in severalty of his half with an easement of support in his neighbor's half; and each may increase the height of his half of the wall at least, if not the entire party wall, when it can be done without damages to the other proprietor: *Graves v. Smith*, 87 Ala. 450; 13 Am. St. Rep. 60, and note.

KIRSCH v. TOZIER.

[143 NEW YORK, 890.]

NOTICE.—ONE WHO TAKES A MORTGAGE UPON REAL PROPERTY HAS CONSTRUCTIVE NOTICE of every fact which could have been ascertained by an inspection of the deeds and mortgages on record in the chain of title. Though one of these mortgages is apparently satisfied of record, yet an intending mortgagee must take notice of all the facts appearing therefrom, and from the entry of satisfaction thereof.

IF A TRUST IS EXPRESSED IN THE INSTRUMENT CREATING IT any act done by the trustees in contravention of the trust is void.

TRUST.—THAT A SATISFACTION OF A MORTGAGE MADE BY A TRUSTEE WAS IN CONTRAVENTION OF HIS TRUST is a fact of which a purchaser or encumbrancer must take notice, when it appears by the record that such mortgage was received by the mortgagee as trustee of certain minors, that he afterwards became the owner of the property subject to the mortgage, and thereafter satisfied it before it was due, and while his interests were adverse to those of his beneficiaries.

TRUSTS.—PERSONS DEALING WITH A TRUSTEE MUST TAKE NOTICE of the scope of his authority.

A TRUSTEE FOR THE BENEFIT OF MINORS HAS NO IMPLIED AUTHORITY to accept payment of a mortgage before it is due, and a purchaser is not protected by a satisfaction of such mortgage entered by a trustee before its maturity, if, as a matter of fact, such entry was in contravention of his trust.

NOTICE.—A PURCHASER OF PROPERTY IS BOUND to act as an ordinarily careful man would under the circumstances, and, if he acts in contravention to the dictates of reasonable prudence, and refuses to inquire when the propriety of inquiry is naturally suggested by the circumstances known to him, he is chargeable with notice of the facts which such an inquiry would have disclosed.

SUIT to reinstate a mortgage executed by defendant L. H. Tozier and wife to defendant Orange L. Tozier and his wife, and which purported to be made in trust for the plaintiffs Michael Kirsch, Peter Kirsch, and Theodore Kirsch, minor children of John Kirsch, and to set aside a discharge of such mortgage entered of record by Orange L. Tozier, and to foreclose the mortgage. The mortgage purported to be for one thousand dollars, payable in three equal payments, the first of which became due November 13, 1887, the second March 13, 1891, and the third October 6, 1892. On September 3, 1883, the mortgagor and wife conveyed the property which was the subject of the mortgage, to the defendant Orange L. Tozier, who, in February, 1886, executed and acknowledged a release of the mortgage, and caused it be recorded. Before the execution of his release, Orange L. Tozier had applied to the defendant Buffalo Savings Bank for a loan, and his application had been granted. An abstract of title had been procured for the purpose of obtaining this loan, which contained a memorandum of the mortgage and of the discharge thereof, March 9, 1886. A decree was entered canceling the discharge of the mortgage, and directing the sale of the mortgaged premises, and the defendant Buffalo Savings Bank thereupon appealed.

Adolph Rebadow, Johnson & Charles, and Spencer Clinton, for the appellants.

F. C. Peck and Frank W. Brown, for the respondents.

394 ANDREWS, C. J. The only serious question presented on the record arises on the claim of the Buffalo Savings Bank, that it was not chargeable with notice nor put upon inquiry to ascertain that the defendant Tozier had no authority to discharge the mortgage in question. The savings bank, when it took its mortgage, had constructive notice of every fact which could have been ascertained by an inspection of the deeds, or mortgages, on record in the chain of title. An inspection of the records would have disclosed the mortgage given by Lester H. Tozier in October, 1875, and that it was given in "in trust" for the three minor children of John M. Kirsch, deceased; that the lands covered by the mortgage were subsequently, in 1883, conveyed by Lester H. Tozier to Orange L. Tozier, the mortgagee named in the mortgage given in trust for the minor children of John M. Kirsch; that after such conveyance, and in March, 1886, Orange L. Tozier, then

³⁹⁵ being the owner of the lands and also the mortgagee "in trust," in that mortgage, himself executed and caused to be recorded a satisfaction of the mortgage, and that this occurred before any part of the sum secured by the mortgage had become due. There can be no doubt that the satisfaction of the mortgage was, as to the defendant Orange L. Tozier, a breach of trust. The satisfaction was without consideration. The question whether Tozier held the mortgage, as trustee, impressed with a trust in favor of the three children of John M. Kirsch, admits of no doubt. The implication from the nature of the instrument, the character of the beneficiaries, and the division of the payments into three equal parts, payable at specified but different dates in the future, is that the instrument was intended to secure to the several beneficiaries as they became of age an equal share of the sum for which the mortgage was given. The acceptance by Orange L. Tozier of the mortgage containing the declaration of the trust was an acknowledgment of the trust on his part, and bound him to perform it. The trust was expressed in the instrument, although not fully set out in words, and any act thereafter done by him in contravention of the trust was by the common law and by the statute void: Statute of Uses and Trusts, 1 Rev. Stats., sec. 65. The discharge of the mortgage was not intended for the benefit of the infants, but to deprive them of the benefit of the security, and, as we have said, was a plain breach of trust. The bank knew, or must be presumed to have known, when it took its mortgage, because an examination of the records would have disclosed the facts: 1. That the mortgage was taken by Tozier in trust for infants; 2. That he satisfied it before it became due; 3. That his relation to the property had changed, so that when he executed the satisfaction he was himself the owner of the land, having an adverse interest to those beneficially interested in the security; and 4. That in satisfying the mortgage he was dealing with himself. Persons dealing with a trustee must take notice of the scope of his authority. An act within his authority will bind the trust estate or the beneficiaries as to third persons acting in good faith and without notice, although ³⁹⁶ the trustee intended to defraud the estate, and actually did accomplish his purpose by means of the act in question. It has frequently been held that a person dealing with an executor, administrator, or trustee, who, from the nature of his office, or by the terms of the trust, has power to

satisfy or transfer the securities of the estate, or to vary the investment from time to time, is not bound to go further and ascertain whether in fact the act of the executor or trustee is justified, and that no breach of trust was intended. It is sufficient for his protection that he acts in good faith, and if the act of the executor or trustee is justified by the terms of the power, the party dealing with him is protected: *Field v. Schieffelin*, 7 Johns. Ch. 153; 11 Am. Dec. 441. But circumstances were disclosed by the record when the bank took its mortgage which precluded the bank from relying upon the recorded satisfaction of the prior mortgage. There was no indication in the mortgage that any power was vested in the trustee Tozier to accept payment of the mortgage before it became due, or to vary the trust security. There was no such affirmative power conferred upon him in fact, and the case of *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826, seems to be a decisive authority that there is no implication of such a power in the case of a trustee of a specified security for the benefit of minors, and no other evidence of his actual authority exists than may be implied from the fact that he is a trustee of the security. The rule declared in that case operated with great severity upon one who, without any actual notice, bought the property upon an official certificate that no lien existed on the premises, paying full value therefor. There the mortgage was given to secure the payment of an annuity to the mortgagee, and also annuities to two minors until they should become of age. The mortgagee afterwards, and before the expiration of the minority of the two children, without consideration, assumed to discharge the mortgage and the satisfaction was duly recorded. It was held that the trustee had no power to satisfy the mortgage before the termination of the trust, and that the purchaser was not protected. It is difficult to perceive any solid distinction between that case ³⁹⁷ and the present. In *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826, there was no express direction that the mortgage security should remain unchanged during the term of the trust. It was given to secure annuities presumably for maintenance. Here the mortgage was given to secure a gross sum, for the benefit of infants, the shares being payable, as was to be inferred, on their severally attaining full age. There is a very pregnant circumstance in the present case bearing upon the point of constructive notice. The bank relied

upon a discharge by Tozier of a lien held by him as trustee on his own land. The transaction as disclosed by the record showed that in executing the satisfaction Tozier was dealing with himself, and that the act was in his own interest, and not only so, but that the mortgage was not due. Tozier was acting in the double capacity of owner of the land and trustee of a lien thereon for other persons. The transaction was unusual and special, and the savings bank, with knowledge of Tozier's relation to the land as owner and trustee, was, we think, bound to inquire by what authority he acted, and if inquiry had been made the invalidity of the transaction would or might have been disclosed. What circumstances will amount to constructive notice, or will put a party upon inquiry, is, in many cases, a question of much difficulty. A purchaser is not required to use the utmost circumspection. He is bound to act as an ordinarily prudent and careful man would do under the circumstances. He cannot act in contravention to the dictates of reasonable prudence, or refuse to inquire when the propriety of inquiry is naturally suggested by circumstances known to him. The circumstances of this case made it, we think, the duty of the bank to inquire in respect to the authority of Tozier to discharge the prior mortgage, and, having failed to do so, is not entitled to protection, as a *bona fide* purchaser: *Baker v. Bliss*, 39 N. Y. 70, and cases cited; *Story's Equity Jurisprudence*, sec. 400, et seq. The other questions are satisfactorily disposed of in the opinions of the referee and at general term, and do not require further elaboration.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. —

NOTICE—CONSTRUCTIVE FROM RECORDS.—Purchasers of land must be deemed to have examined every deed and instrument on record affecting their title, and to have notice of every fact disclosed by the record and every other fact which an inquiry suggested by these records would have led up to: *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826, and note; *Backer v. Pyne*, 130 Ind. 288; 30 Am. St. Rep. 231, and note. See the note to *Stewart v. Matheny*, 14 Am. St. Rep. 539, and the extended note to *Parker v. Conner*, 45 Am. Rep. 184.

NOTICE—DUTY WITH REGARD TO.—Whatever puts a party on inquiry, provided the inquiry becomes a duty and would lead to a knowledge of the required fact by the exercise of ordinary diligence, amounts in law to notice: *Hood v. Fahnstock*, 1 Pa. St. 470; 44 Am. Dec. 147, and note; *Tuttle v. Jackson*, 6 Wend. 213; 21 Am. Dec. 306; *Booth v. Barnum*, 9 Conn. 286; 23 Am. Dec. 339, and extended note; *Converses v. Blumrich*, 14 Mich.

109; 90 Am. Dec. 230, and note; *Hoy v. Bramhall*, 19 N. J. Eq. 563; 97 Am. Dec. 687, and note; *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56; 40 Am. St. Rep. 299, and note.

TRUSTS.—PERSONS DEALING WITH A TRUSTEE are bound at their peril to ascertain the powers of the trustee: *Shaw v. Spencer*, 100 Mass. 382; 97 Am. Dec. 107; 1 Am. Rep. 115.

TRUST—POWERS OF TRUSTEES.—A trustee under a deed of trust has no power to impose new terms or conditions, or alter or vary those contained in the deed: *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270; *Hunt v. Townshend*, 31 Md. 336; 100 Am. Dec. 63, and note.

NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY v. WELSH.

[148 NEW YORK, 411.]

EMINENT DOMAIN.—A FOREIGN CORPORATION may be authorized by the legislature to acquire property by condemnation.

Martin J. Keogh, for the appellants.

Page & Taft, for the respondent.

413 GRAY, J. This proceeding was instituted by the New York, New Haven, and Hartford Railroad Company, a corporation organized under the laws of the state of Connecticut, to condemn, for railroad purposes, certain lands of the defendants, in the village of New Rochelle. It was opposed by the defendants upon various grounds; but the only one we deem it necessary to discuss is that the plaintiff, as a foreign corporation, had received its only powers through a special act of the legislature of this state (chapter 195 of the laws of 1846), and that they were long since exhausted. The argument is made upon the proposition that, as a foreign corporation, it could acquire no right to condemn lands in this state, unless such right were expressly conferred by statute; and that it cannot avail itself of the powers given to corporations of this state by general railway acts. By the special act of 1846 the petitioning company (then the New York and New Haven Railroad Company) were given "permission and authority . . . to continue and extend their railroad from the dividing lines of the states of New York and Connecticut, by such route as shall be established by said company, through the county of Westchester, to the New York and Harlem Railroad Company's line of road," etc. Provision was made for the location of its route, in such manner as

should be approved by three commissioners, to be appointed by the governor. Power was given to purchase and hold such real estate as might be necessary and convenient in accomplishing the objects of the act. It was authorized to construct a railroad, with one or more tracks, on the course designated by its directors, and all essential powers were conferred to enable it to construct, maintain, and to initiate its operation within this state.

It must, of course, be conceded that the provisions of the ⁴¹⁴ special act would be ineffectual to authorize the condemnation of lands not required for the precise purposes of the act and to carry it into effect, in the continuation of the petitioner's road between the points named in this state, and that they gave no power to acquire lands by condemnation proceedings after the railroad was constructed, as therein intended and provided for. At that time, and at all times prior to the adoption of the constitution of 1846, railroad corporations were created by and derived their powers from special laws. Subsequently, pursuant to the authority with which the legislative body was invested by the constitution adopted by the people in 1846, general railroad laws were enacted, with the object of placing the railroad companies within the state upon a footing of equality, as to their privileges and powers, and as to their duties and liabilities. The general act of 1850 (Sess. Laws 1850, c. 140), endowed "all existing railroad corporations within this state" with all the powers and privileges and subjected them to all the duties and liabilities and provisions contained in the act, so far as they should be applicable to their charters. By that act authority was conferred upon railroads organized under its provisions to condemn lands for the construction of their roads; but that authority was broadened by subsequent legislation, so as to provide with respect to all existing corporations for the case where additional land might be required, after the construction of the railroad and for the purpose of operating it. Then, in 1892 (Sess. Laws, c. 565), was placed upon our statute books the present general railroad law, which, in its fourth section, gave power to "every railroad corporation" to acquire by condemnation such real estate as may be necessary for the construction, maintenance, or accommodation of its railroad.

By the seventh section, "all real property, required by any railroad corporation for the purpose of its incorporation shall be deemed to be required for a public use"; and the right is

given to it to acquire title to the real estate required, by condemnation, "where it shall require any further rights to lands, or the use of lands for switches, turnouts," etc. It seems ⁴¹⁵ very clear to us that under the law as it stood before the present general railroad act, as well as under it, the petitioner was included in the general gift of authority to acquire additional real estate, where, as is the case here, it was needed for its proper operation and to accommodate the road to the growth of its business, and to meet the public demands of travel and traffic. The expressions "all existing corporations" in prior legislation, and "any railroad corporation" in the present general law, must be taken in their comprehensive sense, unless the legislature is inhibited by the fundamental law of the state from delegating to other than domestic corporations the power to exercise the right of eminent domain. An argument is based upon the supposed effect of the provisions of the general railroad law, as it was, or as it is, upon the charters of corporations, and upon the supposed conflict with the special act of 1846. We cannot find any such difficulty in bringing the foreign corporation, authorized to operate its road within this state, under the directions and restraints of this law. With respect to whatever rights it acquired, through the permission and authority given by the special act of 1846 to maintain and operate its road here, they were, necessarily, as much subject to subsequent legislation in their regulation, as were those acquired by the corporations of this state. There should, and can be, no question but that, except where the provisions of their charters come into material conflict, corporations, without discrimination as to their origin, lawfully exercising their franchises within this state, were dealt with in the general railroad law, and brought under a uniform system of legal rules and procedure, in the conduct of their affairs and in the operation of their roads. But the question here is whether the legislature of the state could competently authorize foreign railroad corporations, as well as those organized under our laws, to acquire additional lands by condemnation. If it could it must be deemed to have done so by this general law. There is nothing in the constitution of the state which limits the legislature in the exercise of the right of eminent ⁴¹⁶ domain. Its dominion is as broad as the confines of the state, and it may appropriate any part of the property within the state, subject only to the conditions that the appropria-

tion shall be for a necessary public use, and that reasonable compensation shall be made. There is no restraint upon its selection of a corporation created by the laws of another state, as an instrument to carry the appropriation to the public use into effect: *Matter of Townsend*, 39 N. Y. 175. In the present case the petitioner, under the special act of 1846, was authorized to carry on a part of its chartered business, and to operate a portion of its road in this state. *Pro tanto*, it is settled here under the sanction of our laws and, to the extent of its existence and operation here, in the contemplation of those laws, it is *pro hac vice*, a state corporation: *Matter of Townsend*, 39 N. Y. 175. The public interests were deemed to be promoted by permitting it to come within our borders, and there to conduct its chartered business. That permission was an act which recognized its existence as a corporation in this state. Existing here as a corporation, the act, under which it exists, has neither exempted it from such general duties as apply to corporations generally within this state, nor precluded it from enjoying those general privileges which they enjoy, and which the public interests, in connection with the operation of a railroad, require that these quasi public agencies should possess. Those interests demand that the foreign corporation, operating its road here for their benefit, should have the same powers as corporations organized here have to acquire additional lands for the adequate transaction of the corporate business.

To hold otherwise would be, in our judgment, illogical and without sufficient warrant in the law. It is easy to show, from the reading of the various sections of the general present railroad law, that the intention of the legislature was to include every railroad corporation actually within the state, without discrimination. This the respondent's counsel has well pointed out in his brief. As one of the corporations referred to in the general railroad law, those provisions of ⁴¹⁷ the Code of Civil Procedure, which constitute the whole law of procedure upon the subject of condemnation, must govern in the proceedings to acquire the lands required by the company. The procedure of the special act of 1846 was limited to the precise accomplishment of the purpose of the act. With the construction of the road and its completion for operation the provisions as to procedure ceased and became unavailable for the future acquisition of additional real estate. The power conferred by the general railroad law could only

be exercised in accordance with the law of procedure, as enacted by the legislature to govern in all cases of the condemnation of real property for public use: Code Civ. Proc., sec. 3359.

The order appealed from should be affirmed, with costs.

All concur.

Order affirmed.

EMINENT DOMAIN—POWER OF FOREIGN CORPORATIONS to exercise is discussed in *Myers v. McGawock*, 39 Neb. 843; *ante*, p. 627. See, also, the extended note to *Page v. Heineberg*, 94 Am. Dec. 383, where the right of foreign corporations to acquire real property generally is discussed.

BUTLER v. MANHATTAN RAILWAY COMPANY.

[143 NEW YORK, 417.]

DAMAGES.—IN AN ACTION BY A HUSBAND FOR INJURIES TO HIS WIFE RESULTING IN HER MISCARRIAGE he cannot recover compensation for being deprived of prospective offspring.

EVIDENCE—MASTER AND SERVANT—INSULTING REPLY OF SERVANT.

EVIDENCE—RES GESTÆ.—PROXIMITY in point of time with an action which causes an injury does not alone make a declaration or other act a part of the *res gestæ*. It must be a part of the principal act, and so a part of the act itself. Therefore an insulting remark made by a brakeman immediately after inflicting an injury by his negligent act is not admissible against his employer, unless calculated to unfold or qualify the principal act.

EVIDENCE.—DECLARATIONS OF THIRD PERSONS are not admissible, however closely related in point of time to the principal fact, if they are not in their nature a part of it.

Edward B. Thomas, for the appellant.

Gilbert D. Lamb, for the respondent.

419 ANDREWS, C. J. The evidence supports the claim that through the negligence of the guard in closing the gate to the platform of one of the defendant's cars, before the plaintiff's wife, who was seeking to enter the car, had got upon the platform, she was seriously injured, and that as one of the consequences of the injury she had a miscarriage a few days thereafter. Her pregnancy had then existed a few weeks.

420 The court permitted the jury to consider and to include

in the verdict "any damages arising from the injury and resulting in depriving the plaintiff of prospective offspring." The charge on this point was expanded and repeated by the judge. The defendant excepted to this ruling. We think the exception was well taken, construing the charge most favorably to the plaintiff, that the court intended to confine the jury to a consideration of damage to the plaintiff from the loss of the chance of offspring involved in the particular miscarriage proved.

The action was for the loss of service of the wife. The term "service" in actions of this character includes any pecuniary injury suffered by the husband from having been deprived of the aid, comfort, and society of his wife, or which reasonably may be expected to result in the future, including charges and expenses incurred, or which he may be put to in consequence of the wrong: Cooley on Torts, 266 [226]. The wife has her own action for her physical injury, and for the pain and suffering to which she has been or will be subjected. The husband's action is for the consequences affecting his estate and for depriving him of the aid, society, and companionship of his wife, which, except for the wrong, he might reasonably expect to enjoy. It is doubtless true that the raising of children is one of the objects of marriage. The husband may, and usually does, contemplate the birth of children as one of the important advantages of the marital relation. At common law, and independently of statutory enactments, the death of a person caused by the negligence of another gave no right of action for damages to any person, however closely connected with the deceased. But recent statutes, changing the rule of the common law, recognize the ties of kindred, the mutual dependence of parents and children, husband and wife, and of persons standing in other degrees of relationship, the reasonable expectations that pecuniary aid or assistance, even outside of legal obligations, will be extended by relatives to each other in case of necessity, and upon this basis have given a statutory action for the benefit of the widow and next of kin of a deceased person whose death was caused by the wrongful act, neglect, or default, of another, against the wrongdoer, to recover the pecuniary damages, not exceeding a specified amount, resulting from such death, to the persons for whose benefit the action is given: Laws of 1847, c. 450; Laws of 1849, c. 256. Under these statutes actions are allowed to be maintained for the death of infant children for

the benefit of parents, and recoveries have been sustained, the basis of damage being the supposed pecuniary value to the parents of the life of the infant: *Etherington v. Prospect Park etc. R. R. Co.*, 88 N. Y. 641; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504; *Houghkirk v. Delaware etc. R. R. Co.*, 92 N. Y. 219; 44 Am. Rep. 370. The difficulty of finding any safe basis upon which to estimate the pecuniary damages in such cases has been frequently adverted to by the courts. Whether the infant would have lived to an age capable of rendering service, and whether the continued life would be a pecuniary benefit or burden, and the numerous contingencies which may affect the value of the life make the ascertainment of such value by a jury, in a great degree, a matter of speculation and conjecture. But where the inquiry relates to the value of the life of a child cut off in infancy there are some material facts capable of proof which may be placed before the jury, and which afford some aid in estimating the pecuniary loss suffered by parents or other relatives. The age and sex of the infant may be proved, its mental and physical condition, its bodily strength, and generally whether there was the apparent promise of a continued or useful life, or the contrary. The speculation which, in the present case, the jury were permitted to make, had not even these safeguards, slight as they are. They were allowed to estimate the pecuniary interest which a husband had in the chance that an embryo, not yet quickened into life, would become a living child. The sex could not be known, and, if born alive, the infant might have been destitute of some faculty, or so physically infirm as to make it a helpless charge. There are no elements whatever upon which a jury could base any conclusion that a pecuniary injury had been suffered by the ⁴²² plaintiff from the loss of the unborn child, and this inquiry should have been excluded from the consideration of the jury as too remote and speculative to form an element in the recovery. Where a wrong had been done from which pecuniary injury has resulted, or where injury is the natural or probable result of a wrong, the injured party is not remediless, although the extent of the injury is not capable of precise proof. The jury in such a case may fix the damages within reasonable limits, as best they may. Actions for defamation, or involving recovery for pain or suffering, are examples. But where damages claimed are neither the probable result of the wrong nor capable of proof they cannot be

awarded by the jury. It is not in the interest of justice to extend the field of speculation in jury trials beyond its present limits, and to sustain the ruling in this case would go beyond what has been hitherto sanctioned by the courts.

We think there was error also in one of the rulings upon the admission of evidence. The plaintiff's wife testified to the closing of the gate and the blow received, and stated that at the time the guard was looking in the opposite direction; that immediately after the blow she made an exclamation of pain. The plaintiff's counsel then asked the witness "what the guard said in reply to her exclamation of pain." The question was objected to by the counsel for the defendant as incompetent and hearsay, whereupon the plaintiff's counsel said: "I intend to prove that the brakeman in charge of the brakes at the moment of the blow did not treat her (the plaintiff's wife) with respect, but, on the contrary, insulted her." The trial judge, after warning the plaintiff's counsel, finally allowed the question to be put, and the witness answered: "He said, I can go to hell. Shut up." The defendant's counsel excepted to the evidence. The only claim made in support of the ruling of the court is that the remark of the brakeman was part of the *res gestæ*. We think the ruling cannot be supported upon this ground. The only circumstance upon which it can be claimed to have been part of the *res gestæ* was its connection in point of time with the transaction ⁴²³ under investigation, viz., the alleged injury from the closing of the gate. While proximity in point of time with the act causing the injury is, in every case of this kind, essential to make what was said by a third person competent evidence against another as part of the *res gestæ*, that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself. But as in this case the act was complete before the remark of the brakeman was made, although closely connected with it in point of time, and was not one naturally accompanying the act, or calculated to unfold its character or quality, it was not admissible as *res gestæ*. It was as independent of the principal fact, and as incompetent as evidence, as though the act and the remark had been much further separated in point of time. *Res gestæ* in a case like this implies substantial coincidence in time, but if declarations of third persons are not in their nature a part of the fact they are not admissible in evidence, however closely related in point of time:

See *Waldele v. New York etc. R. R. Co.*, 95 N. Y. 274; 47 Am. Rep. 41, and cases cited. The remark of the brakeman was brutal, and for that reason was calculated to prejudice the jury, but it had nothing to do with the question at issue, viz., whether the plaintiff's wife sustained an injury through the defendant's negligence, and, having been admitted against the protest of the defendant's counsel, its admission was reversible error.

Upon both grounds stated the judgment should be reversed and a new trial granted.

All concur, except BARTLETT, J., not voting.

Judgment reversed. —

DAMAGES FOR PRODUCING MISCARRIAGE THROUGH NEGLIGENCE.—A pregnant woman passenger on a railway train was carelessly directed by a brakeman to leave the train at a station three miles short of her destination. It was a cloudy night, and she could not see the station, and, being a stranger there, she walked until she reached her destination. This exertion brought on a miscarriage and sickness, for which injury it was held that the defendant was liable: *Brown v. Chicago etc. Ry. Co.*, 54 Wis. 342; 41 Am. Rep. 41, and note.

CARRIERS—LIABILITY TO PASSENGERS FOR INSULTS BY EMPLOYEES.—Though insults and injury are acts in departure from the authority conferred or implied, nevertheless, when they occur in the course of the employment, the master is answerable for the wrong: *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261; 28 Am. St. Rep. 632, and note. It is the duty of carriers of passengers to exercise a high degree of care to protect them from violence or insult from passengers, strangers, or the carriers' servants: *Dillingham v. Russell*, 73 Tex. 47; 15 Am. St. Rep. 753, and note. For a discussion of the liability of masters for the torts of their servants, see the extended notes to *Wars v. Barataria etc. Canal Co.*, 35 Am. Dec. 192; *Kansas City etc. R. R. Co. v. Kelly*, 59 Am. Rep. 601, and *Bryant v. Rich*, 8 Am. Rep. 316.

RES GESTÆ—DECLARATIONS WHEN PART OF.—In order that the declarations of a party may be admissible in evidence as part of a transaction they must grow out of the principal fact, illustrate its character, and be contemporaneous with it: *Bush v. Roberts*, 111 N. Y. 478; 7 Am. St. Rep. 741, and note; *Ehrlinger v. Douglas*, 81 Wis. 59; 29 Am. St. Rep. 863, and note, with the cases collected. See, also, the notes to the following cases: *Hinchcliffe v. Koontz*, 16 Am. St. Rep. 407; *Chattanooga etc. R. R. Co. v. Liddell*, 21 Am. St. Rep. 178, and *Leahey v. Cass Ave. etc. Ry. Co.*, 10 Am. St. Rep. 306.

RES GESTÆ. — DECLARATIONS OF THIRD PERSONS, whether admissible: See *Ehrlinger v. Douglas*, 81 Wis. 59; 29 Am. St. Rep. 863; *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 71; 24 Am. St. Rep. 764; *Missouri Pac. Ry. Co. v. Ivy*, 71 Tex. 409; 10 Am. St. Rep. 758, and *St. Louis etc. Ry. Co. v. Weakly*, 50 Ark. 397; 7 Am. St. Rep. 104.

WILLIAMS v. HAYS.

[143 NEW YORK, 442.]

SHIPPING.—A PART OWNER OF A VESSEL IS NOT an agent of his co-owners when he takes it to sail on shares, agreeing out of its earnings to pay all expenses, and to give the others a certain proportion of the net proceeds.

LUNATIC'S LIABILITY FOR NEGLIGENCE.—An insane person is just as responsible for his torts as a sane person. This rule is applicable to all torts, except, perhaps, those in which malice, and therefore intention, actual or imputed, is a necessary ingredient.

TORTS.—A LUNATIC OR INFANT IS ANSWERABLE for his tort, whether it consists of pure negligence or an act of trespass.

NEGLECT OF INSANE PERSON.—If one of several owners of a ship is in charge thereof under a contract with the others, as lessee or bailee, and, on his attention being called to its peril, refuses to believe in such peril, though apparent, or to take any measures to avert it, and thereby the ship is lost, he is answerable to his co-owners for his negligence, though it was induced by his insanity at the time.

LUNATIC'S LIABILITY FOR A BREACH OF CONTRACT.—If a person is sane when he enters into a contract he is answerable for his subsequent breach thereof committed by him when insane.

George A. Black, for the appellant.

William W. Goodrich, for the respondent.

444 **EARL, J.** The defendant and others, among whom were Parsons and Loud, were joint owners of the brig *Sheldon*. By an arrangement between the defendant and the other owners he took the vessel to sail on shares. He was to man the vessel, to pay the crew, and to furnish the supplies, and he was to have one-half of her earnings, after certain deductions, for his share, and the other owners were to have from him the other half, after certain deductions, for their share. He was to have the absolute control and management of the vessel, and became her owner *pro hac vice* *Webb v. Pierce*, 1 Curt. 113; *Thorp v. Hammond*, 12 Wall 416; *Somes v. White*, 65 Me. 542; 20 Am. Rep. 718. The defendant, under the arrangement between him and the other owners, in no sense became their agent or servant. In *Webb v. Pierce*, 1 Curt. 113, it was held that where a master hires a vessel on shares under an agreement to victual and man her, and employ her on such voyages as he thinks best, having thereby the entire possession, 445 command, and navigation of her, he thereby becomes her owner *pro hac vice*, and the relation of principal and agent does not exist between him and the owners. The other cases are to the same effect.

The defendant thus became the charterer or lessee of the vessel, and was responsible to the other owners for due care in her management, and so the trial judge held.

The case of *Moody v. Buck*, 1 Sand. 304, which holds that one co-owner of a vessel who takes and navigates her for his own benefit is not liable to his co-owners for her loss by his carelessness, even if correctly decided upon the facts there existing is not applicable to a case like this, where the co-owner takes the vessel, not in his right as co-owner, for the purpose of using his own, but under an agreement with the other owners whereby he becomes the charterer, lessee, or bailee of the vessel, and thus bound to some duty of care and fidelity. There can, however, be no question that that case was incorrectly decided, and the rule laid down therein is not consonant with reason or justice. I cannot find that it has ever been followed as authority in any subsequent case, and it is in conflict with many authorities: *Sheldon v. Skinner*, 4 Wend. 529; 21 Am. Dec. 161; *Chesley v. Thompson*, 3 N. H. 9; 14 Am. Dec. 324; *Herrin v. Eaton*, 13 Me. 193; 29 Am. Dec. 499; *Martyn v. Knowllys*, 8 Term Rep. 145; *Guillot v. Dossat*, 4 Mart. (La.) 203; 6 Am. Dec. 702; Domat's Civil Law, sec. 1489; 1 Parsons on Maritime Law, 95; Ford's Law of Merchant Shipping, 35, 45; Cooley on Torts, 328, 659.

The *Sheldon* was loaded with ice and started from the coast of Maine for a southern port. She soon encountered storms, and the defendant for more than two days was constantly on duty, and then, becoming exhausted, he went to his cabin, leaving the vessel in charge of the mate and crew. He took a large dose of quinine and laid down. The mate found that the rudder was broken and useless, and that the vessel could not be steered. He caused the captain to come on deck. He refused to believe that the vessel was in any trouble, and refused the help of two tugs, the masters of which saw the difficulty under which his vessel was laboring, and successively offered to take her in tow. They cautioned him that his vessel ⁴⁴⁶ was gradually and certainly drifting upon the shore; and in broad daylight she did drift upon the shore, without any effort upon the part of the defendant or any of his crew to save her, and she became a total wreck. Parsons and Loud had insured their interest in the Phoenix Insurance Company, and it paid them the loss. It thus became subrogated to their claim, if any, against the defendant, for his

negligence or misconduct in the management of the vessel, and it assigned that claim to the plaintiff. He, standing in the shoes of Parsons and Loud, brought this action against the defendant to recover damages for the loss of the vessel, alleging that it was due to his carelessness and misconduct.

The defendant claims that from the time he went to his cabin, leaving the vessel in charge of his mate and crew, to the time the vessel was wrecked, and he found himself in the life-saving station, he was unconscious, and knew nothing of what occurred—that, in fact, he was from some cause insane, and, therefore, not responsible for the loss of the vessel. The case was submitted to the jury on the theory that the defendant, if sane, was guilty of negligence causing the destruction of the vessel, but if insane was not responsible for her loss through any conduct on his part, which in a sane person would have constituted such negligence as would have imposed responsibility.

The important question for us to determine then is, whether the insanity of the defendant furnishes a defense to the plaintiff's claim, and I think it does not. The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except, perhaps, those in which malice, and therefore intention, actual or imputed, is a necessary ingredient, like libel, slander, or malicious prosecution. In all other torts intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another, and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage. The liability of a ⁴⁴⁷ lunatic for his torts, in the opinions of judges, has been placed upon several grounds. The rule has been invoked that, where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that public policy requires the enforcement of the liability that the relatives of a lunatic may be under inducement to restrain him, and that tort feors may not simulate or pretend insanity to defend their wrongful acts, causing damage to others. The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others.

In Buswell on Insanity, section 355, it is said: "Since, in a civil action for a tort, it is not necessary to aver or prove any

wrongful intent on the part of the defendant, it is a rule of the common law that, although a lunatic may not be punishable criminally, he is liable in a civil action for any tort he may commit."

In Cooley on Torts, page 98, the learned author says: "A wrong is an invasion of right to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore the law in giving redress has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. . . . There is consequently no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him, for, as is said in an early case, 'the reason is because he that is damaged ought to be recompensed.'" And at page 100 he says: "Undoubtedly there is some appearance of hardship—even of injustice—in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question ⁴⁴⁸ of liability in these cases, as well as in others, is a question of policy, and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose."

In Shearman and Redfield on Negligence, section 57, it is said: "Infants and persons of unsound mind are liable for injuries caused by their tortious negligence; and, so far as their responsibility is concerned, they are held to the same

degree of care and diligence as persons of sound mind and full age. This is necessary, because otherwise there would be no redress for injuries committed by such persons, and the anomaly might be witnessed of a child, having abundant wealth, depriving another of his property without compensation."

In *Reeves on Domestic Relations*, page 386, it is said: "Where the minor has committed a tort with force he is liable at any age; for in case of civil injuries, with force, the intention is not regarded; for in such case a lunatic is as liable to compensate in damages as a man in his right mind."

The doctrine of these authorities is illustrated in many interesting cases: *Bullock v. Babcock*, 3 Wend. 391; *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 273; *Krom v. Schoonmaker*, 3 Barb. 647; *Conklin v. Thompson*, 29 Barb. 218; *Cross v. Kent*, 32 Md. 581; *Neal v. Gillett*, 23 Conn. 437; *Huchting v. Engel*, 17 Wis. 230; 84 Am. Dec. 741; *Brown v. Howe*, 9 Gray, 84; 69 Am. Dec. 276; *Morain v. Devlin*, 132 Mass. 87; 42 Am. Rep. 423; *Beals v. See*, 10 Pa. St. 56; 49 Am. Dec. 573; *Humphrey v. Douglass*, 10 Vt. 71; 33 Am. Dec. 177; *Morse v. Crawford*, 17 Vt. 499; 44 Am. Dec. 349; *Cross v. Andrews*, Cro. Eliz. 622; *Jennings v. Rundall*, 8 Term Rep. 336.

⁴⁴⁰ In *Bullock v. Babcock*, 3 Wend. 391, Judge Marcy, writing in a case where an infant twelve years old was held liable for putting out one of the eyes of another infant, said: "The liability to answer in damages for trespass does not depend upon the mind or capacity of the actor; for idiots and lunatics are responsible in the action of trespass for injuries inflicted by them."

In *Krom v. Schoonmaker*, 3 Barb. 647, it was held that a lunatic may be sued for an injury done to another, because the intent with which the act was done is not material. There the action was against a justice of the peace for false imprisonment for issuing a warrant without any complaint, by virtue of which the plaintiff was arrested.

In *Cross v. Kent*, 32 Md. 581, it was held that a lunatic or insane person, though not punishable criminally, is liable to a civil action for any tort he may commit; that, in an action against a party for setting fire to and burning a barn, neither evidence of his lunacy, nor that the burning was the result of accident, is admissible in mitigation of compensatory damages.

In *Neal v. Gillett*, 23 Conn. 437, in an action on the case for damages caused by the negligence of the defendants, who were severally of the ages of thirteen and sixteen at the time of the injury, it was held that, where the plaintiff claims only actual damages, the youth of the defendants is not to be taken into consideration in determining the question of their negligence.

In *Huchting v. Engel*, 17 Wis. 230, 84 Am. Dec. 741, it was held that an infant, though under seven years of age, was liable in an action of trespass for breaking and entering the plaintiff's premises, and breaking down and destroying his shrubbery and flowers.

In *Karow v. Continental Ins. Co.*, 57 Wis. 56, 46 Am. Rep. 17, it is said in the opinion: "While the burning of his own property by an assured under no restraint of duty, and incapable of care, and without any intent or design, does not relieve the company from liability, yet the same act of burning another's property might subject such person to damages therefor, not on the ground of negligence, as that word is usually understood, but, in the language of Chief Justice Gibson, 'on the ⁴⁵⁰ principle that, where a loss must be borne by one of two innocent persons, it should be borne by him who occasioned it.'"

In *Brown v. Howe*, 9 Gray, 84, 69 Am. Dec. 276, an insane person carelessly set fire to the dwelling-house of his guardian, and while it was held that the guardian could not be allowed the amount of his damages in his probate account, it was held that his only course was to sue the administrator of the lunatic, who had died, in a court of law, and have a judgment fixing his damages, and collect it from the assets, if the estate was solvent; if not, to share with the other creditors.

In *Morain v. Devlin*, 132 Mass. 87, 42 Am. Rep. 423, it was held that a lunatic was civilly liable for an injury caused by the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which he is the owner, and of which his guardian has the care and management.

In *Beals v. See*, 10 Pa. St. 56, 49 Am. Dec. 573, it was said by Gibson, C. J: "As an insane man is civilly liable for his torts he is liable to bear the consequences of his infirmity, as he is liable to bear his misfortunes, on the principle that,

where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it."

In *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 349, in an action for tort, it was held that the fact that the defendant was insane at the time of committing the injury was no defense to the action, and that, if the action be for destroying property intrusted to the defendant, it is no defense that the plaintiff, at the time of delivering the property to the defendant, knew that he was insane. In the opinion of the court it is said: "It is a common principle that a lunatic is liable for any tort which he may commit, though he is not punishable criminally. When one receives an injury from the act of another this is a trespass, though done by mistake or without design. Consequently no reason can be assigned why a lunatic should not be held liable."

In *Jennings v. Rundall*, 8 Term Rep. 336, Lord Chief Justice Kenyon said: "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice." Lawrence, J., also writing in that case, mentioned the distinction ⁴⁵¹ between negligence and an act done by an infant; and he held that the same rule would have to be applied if an action were brought against an infant for negligently keeping the plaintiff's cattle, by which they died, as would be applied if the declaration charged the infant with having given the cattle bad food by which they died.

There can be no distinction as to the liability of infants and lunatics, between torts of nonfeasance and of misfeasance—between acts of pure negligence and acts of trespass. The ground of the liability is the damage caused by the tort. That is just as great whether caused by negligence or trespass; the injured party is just as much entitled to compensation in the one case as in the other, and the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in the one case as the other; and I have found no case which makes the distinction. That infants and lunatics are liable for damage to property caused by their negligent acts was asserted in several of the authorities above cited; and it has never been doubted that at common law an action of trover would lie against one intrusted with the personal property of another who destroys it, whether the destruction be by a negligent act or a willful tort.

I sum up the result of my examination of the authorities as follows: This vessel was intrusted to the defendant, not as agent, but, as to the other owners, as charterer, lessee, or bailee, and if he caused her destruction by what in sane persons would be called willful or negligent conduct, the law holds him responsible. The misfortune must fall upon him and not upon the other owners of the vessel.

If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm we would have had a different case to deal with. He was not responsible for the storm, and, while it was raging, his efforts to save the vessel were tireless and unceasing, and, if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought ⁴⁵² not to be attributed to him as a fault. In reference to such a case we do not now express any opinion.

If it could be held that the obligation of the defendant to take due care of the vessel while she was in his possession, under his contract with the other owners, was an obligation springing out of his contract, and thus a contract obligation, such a view of the case would not aid him. He was sane when he entered into the contract, and his subsequent insanity would furnish no defense to an action for a breach of the contract: *Oakley v. Morton*, 11 N. Y. 25; 62 Am. Dec. 49; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487; *Evans v. United States Life Ins. Co.*, 64 N. Y. 304; *Spalding v. Rosa*, 71 N. Y. 40; 27 Am. Rep. 7.

If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness. They did nothing whatever to save the vessel. They did not even expostulate with him or tender him any advice or a word of caution, and yet the mate saw what the captains of the tugs saw at a distance—that something was the matter with him. It is difficult to perceive how they could have failed to see that he was either incompetent to manage the vessel, or that he was willfully wrecking her. We leave the effect of their conduct upon the defendant's liability to be

determined, if it should become necessary, upon the new trial, simply saying that the question is worthy of careful consideration, whether the defendant can allege his own incompetency, and at the same time claim that for any reason the mate ought not to have taken control of the vessel.

The case of *Hays v. Phenix Ins. Co.*, 25 Jones & S. 199, affirmed, 127 N. Y. 656, which seems to have controlled the decision below, is not an authority for the defendant. There he brought an action against the insurance company to recover ⁴⁵³ the amount of his insurance upon this vessel, and his mere carelessness, whether sane or insane, was no defense to such an action. It is an unquestioned rule of law that an insurance company cannot successfully defend an action upon its policy to recover for a loss by showing that the insured destroyed the property while insane, or that its destruction was caused by the carelessness of his agents and servants. The liability of the insured to respond in damages for the loss or destruction of the property of another owner stands upon different principles: *Liverpool S. S. Co. v. Phœnix Ins. Co.*, 129 U. S. 438; *Karow v. Continental Ins. Co.*, 57 Wis. 56; 46 Am. Rep. 17.

Since writing the above, suggestions have been made by some of my brethren which should receive some attention.

The fact that the defendant was a part owner of the vessel can play no part in this discussion. He did not take the vessel as part owner, but under the contract with the other owners; and, as to them, his duties and obligations were such as spring from the relation created by that contract. Further, he was the minority part owner, and the others were the majority part owners, and, as such, had the right and the power to control the vessel against his will: *Ward v. Ruckman*, 36 N. Y. 36; 93 Am. Dec. 479; *Gould v. Stanton*, 16 Conn. 12; *The William Bagaley*, 5 Wall. 406; *McLochlin's Merchant Shipping*, 89. In *Ward v. Ruckman*, 36 N. Y. 36, 93 Am. Dec. 479, it was held that the majority owners of a vessel have the right to displace the master at their pleasure, though he be in possession as part owner. In making their contract with the defendant the other part owners were exercising their right as the majority part owners. *Non constat*, but that they would, except for the contract, have displaced the defendant and appointed some other person master of the vessel. Therefore, as I have before said, he must be treated as the charterer, lessee, or bailee of the vessel.

I quite agree, and no one in this case has contended for more, that the defendant was bound, in the navigation and use of the vessel, to bestow only ordinary care, to wit: Such care as a reasonably careful and prudent owner would ordinarily give to his own vessel. Such is the standard of care set ⁴⁵⁴ up for all bailees of personal property for hire. But what is that standard? It is not such care as a lunatic, a blind man, a sick man, or a man otherwise physically or mentally imperfect or impotent could give. Such a man is not the jural man of ordinary prudence, and he does not furnish the standard. The standard man is no individual man, but an abstract or ideal man of ordinary mental and physical capacity and ordinary prudence. The particular man whose duty of care is to be measured does not furnish the standard. He may fall below it in capacity and prudence, yet the law takes no account of that, but requires that he should come up to the standard and his duty be measured thereby.

So when we have defined, as above, the duty of care resting upon the defendant we have made no progress in the solution of the question here involved, for it is conceded that he took no care whatever. It is sought, however, to excuse him because he was insane and incapable of care; and the question, and, in the end, the sole question, for us to determine is, whether that excuse is a good one; and I have heard no argument to sustain it. It is unquestioned that an insane person is civilly liable for his active torts; and is there, then, any reason for saying that he is not liable for his negligent torts? To uphold this judgment we must ingraft upon the general rule the exception or qualification that he is not liable for his negligent torts. If the defendant had taken a torch and fired the vessel he would have been liable for her destruction, although his act was unconscious and accompanied by no free will. But if he had negligently fired the vessel and thus destroyed her, being incapable from his mental infirmity from exercising any care, the claim must be that he would not be liable. Such a distinction is not hinted at in any authority, has no foundation whatever in principle or reason, and cannot stand with authorities I have before cited.

My conclusion, therefore, is that the judgment should be reversed and a new trial granted; costs to abide event.

All concur, except PECKHAM, GRAY, and O'BRIEN, JJ., dissenting.

Judgment reversed.

SHIPPING.—PART OWNERS OF VESSELS, POWERS AND RIGHTS OF: See *Swift v. Tatner*, 89 Ga. 660; 32 Am. St. Rep. 101, and note.

The Civil Liability of Incompetent Persons has heretofore been considered in the notes in this series, except as to the matters discussed and decided in the principal case. Thus, the liability of infants for their torts was the subject of the note to *Humphrey v. Douglas*, 33 Am. Dec. 179-185, and the same topic was further considered in connection with their liability on contracts in the monographic note to *Craig v. Van Bebber*, 18 Am. St. Rep. 573-724. The liability of insane persons upon their contracts is treated in an early note in the American Decisions: Note to *Jackson v. King*, 15 Am. Dec. 361-369. From this note, and the various decisions upon the subject, it will appear that while there is some conflict of authority, yet, upon the whole, the liability of lunatics upon their contracts does not substantially differ from that of infants upon theirs. The former, as well as the latter, are answerable for necessities supplied to and used by them suitable to their state and condition and without which they would have been left in want, and this irrespective of their being under guardianship: *Richardson v. Strong*, 13 Ired. 106; 55 Am. Dec. 430; *Young v. Stevens*, 48 N. H. 133; 97 Am. Dec. 592; *Ex parte Northington*, 37 Ala. 496; 79 Am. Dec. 67; *Beals v. See*, 10 Pa. St. 56; 49 Am. Dec. 573. If a lunatic is under guardianship, or, as it is sometimes expressed, "after inquisition found," his contracts, other than for necessities, are generally treated as void: *Hughes v. Jones*, 116 N. Y. 67; 15 Am. St. Rep. 386; *L'Amoureux v. Crosby*, 2 Paige, 422; 22 Am. Dec. 655; *Pearl v. McDowell*, 3 J. J. Marsh. 658; 20 Am. Dec. 199. The like rule will in most cases be applied where, at the time of the contract, he was manifestly deprived of reason, and this was so obvious that persons dealing with him are justly chargeable with acting in bad faith. Otherwise, if the alleged lunatic is not under guardianship, and his mental unsoundness is not obvious, his contracts, like those of an infant, are not void, but voidable only: *Odom v. Reddick*, 104 N. C. 515; 17 Am. St. Rep. 686; *Pearson v. Cox*, 71 Tex. 246; 10 Am. St. Rep. 740; *Brumbaugh v. Richcreek*, 127 Ind. 240; 22 Am. St. Rep. 649. They may properly be regarded as more obligatory than those of infants, for, where they have been fully executed and the benefits thereof received by the lunatic or applied to his use, he will not ordinarily be permitted to ignore them, but can escape from them only when he has returned the advantages derived from them, or, at least, he will not be allowed to disaffirm them if to do so would be contrary to equity and good conscience: *Sims v. McLure*, 8 Rich. Eq. 286; 70 Am. Dec. 196; *Behrens v. McKenzie*, 23 Iowa, 333; 92 Am. Dec. 428; *Lancaster County Bank v. Moore*, 78 Pa. St. 407; 21 Am. Rep. 24, and note; *McCormick v. Littler*, 85 Ill. 62; 28 Am. Rep. 610; *Allen v. Berryhill*, 27 Iowa, 534; 1 Am. Rep. 309; *Corbit v. Smith*, 7 Iowa, 60; 71 Am. Dec. 431; *Young v. Stevens*, 48 N. H. 133; 97 Am. Dec. 592; *Wireback v. First Nat. Bank*, 97 Pa. St. 543; 39 Am. Rep. 821; *Hovey v. Hobson*, 53 Me. 451; 89 Am. Dec. 705.

Lunatic's Liability for Torts.—Substantially the whole law respecting the liability of a lunatic for his torts is stated in the principal case, wherein it affirms the absolute liability of all lunatics for torts committed by them, unless, to the completion of the tort in question, the intent to do wrong is

essential, and the mental state of the lunatic is such that he cannot justly be charged with forming or acting upon the intent in question: *Krom v. Schoonmaker*, 3 Barb. 647; *Ward v. Conatser*, 4 Baxt. 64; *Lancaster etc. Bank v. Moore*, 78 Pa. St. 407; 21 Am. Rep. 24; *Ex parte Leighton*, 14 Mass. 207; *Beals v. See*, 10 Pa. St. 56-61; 49 Am. Dec. 573; *Morse v. Crawford*, 17 Vt. 499; 44 Am. Dec. 349. Therefore a lunatic is liable for the destruction of property by him: *Gross v. Kent*, 32 Md. 581; *McIntyre v. Sholty*, 24 Ill. App. 605; 121 Ill. 660; 2 Am. St. Rep. 140; and also for the taking of a human life where there is a statute imposing civil liability for that wrong: *McIntyre v. Sholty*, 121 Ill. 660; 2 Am. St. Rep. 140. Except the principal case we have not met with any direct decision enforcing the liability of a lunatic for negligence, unless *Morain v. Devlin*, 132 Mass. 87, 42 Am. Rep. 423, may be regarded as a decision of that class. This was an action of tort for personal injuries occasioned to the plaintiff by a defect in a doorstep in a tenement building owned by the defendant. He was an insane person, confined as such, in one of the lunatic hospitals of the state, and his property, including that in which the injury was suffered, was under the care and management of his guardian. At the trial the defendant asked the court to instruct the jury that the action could not, as a matter of law, be maintained. This request was refused, and the case submitted to the jury, which returned a verdict in favor of the plaintiff. The court did not, however, in its opinion place the liability of the defendant on the ground of negligence, but said: "But this case does not require the affirmance of so broad a proposition. This is not an action for a wrong done by the personal act or neglect of the lunatic, but for an injury suffered by reason of the defective condition of a place, not in the exclusive occupancy and control of a tenant, upon real estate of which the lunatic himself, and not his guardian, is the owner: *Harding v. Larned*, 4 Allen, 426; *Harding v. Weld*, 128 Mass. 587, 591. The owner of real estate is liable for such a defect, although not caused by his own neglect, but by that of persons acting in his behalf or under contract with him: *Looney v. McLean*, 129 Mass. 33; 37 Am. Rep. 295; *Gorham v. Gross*, 125 Mass. 232; 28 Am. Rep. 224; *Burdett v. Boston Gas Light Co.*, 117 Mass. 533; 19 Am. Rep. 421. And there is no precedent and no reason for holding that a lunatic, having the benefits, is exempt from the responsibilities, of ownership of real estate. The ruling requested was therefore rightly refused."

Whether in Prosecutions for Libel or Slander insanity on the part of the defendant may constitute a complete defense is a question which we think to be still unsettled. There are several decisions affirming that it is improper to exclude evidence of insanity in actions of this class: *Dickinson v. Barber*, 9 Mass. 225; 6 Am. Dec. 58; *Yeates v. Reed*, 4 Blackf. 463; 32 Am. Dec. 43; *Gates v. Meredith*, 7 Ind. 440; *Bryant v. Jackson*, 6 Humph. 199. This must necessarily be so, for the defendant has a right to rebut the presumption of malice and to mitigate damages both by removing this presumption and by showing that no injury could have resulted to the plaintiff from the wrongful act of which he complains, and it may be that, where the insanity of the defendant was notorious, or so obvious at the time of his making slanderous or libelous statements, that those statements were known to those who heard or read them to emanate from a lunatic, that this would constitute a complete defense to an action by establishing the impossibility of plaintiff being injured thereby. If, however, notwithstanding the lunacy of the defendant, it appears that his slanderous or libelous statements have injuriously affected the plaintiff, he is, in our judgment, upon a proper

application of the general rule respecting the torts of Innatics, entitled to recover compensation for the actual damages sustained thereby.

As punitive or exemplary damages, where recoverable at all, are awarded only by way of punishment, and for the reformation of the offender, it is manifest that they can never be recovered of a lunatic for an act committed while he was insane. Therefore, whatever be the character of the tort charged against a defendant, he must necessarily be allowed, where exemplary damages might otherwise be recovered against him, to prove that, at the time of the commission of a wrongful act, he was insane, and, this proof being made to the satisfaction of the court or jury, the verdict or judgment against him must be limited to compensatory damages only: *McIntyre v. Sholly*, 121 Ill. 660; 2 Am. St. Rep. 140; *Krom v. Schoonmaker*, 3 Barb. 647; *Ward v. Conatser*, 4 Baxt. 64.

CASES
IN THE
SUPREME COURT
OF
OREGON.

SABIN v. COLUMBIA FUEL COMPANY.

[25 OREGON, 15.]

MORTGAGES—WHEN FRAUDULENT.—A mortgage designed and made for the benefit of the mortgagor, to enable him to continue in business, by placing his property beyond the reach of legal process, is void as to creditors, although intended in good faith for the ultimate benefit of all the creditors, by preventing a sacrifice of the property.

MORTGAGE BY CORPORATION TO SECURE ADVANCES.—A corporation in active business may provide, by mortgage of its property, for advances, both present and future. Such a provision, without any stipulation that the mortgagor may continue in business for his own benefit, or that the mortgagee shall make any additional advances, does not necessarily render the mortgage fraudulent, although it may subsequently transpire that the mortgagor was, in fact, unable to pay all his debts at the time the mortgage was given.

MORTGAGES—RIGHT TO MAKE AS AGAINST CREDITORS.—Every mortgage necessarily tends to hinder and delay creditors other than the mortgagee, but if fairly and honestly made is neither an unjust or unlawful interference with the rights of others, within the terms of a statute making conveyances void if intended to hinder or delay creditors.

MORTGAGES—FRAUD—BURDEN OF PROOF.—Although circumstances surrounding the execution of a mortgage point with some directness to the conclusion that it was intended to hinder and delay creditors, yet, if such circumstances are all explained consistently with honesty and good faith, the mortgage is *prima facie* valid, and the burden of proof to show fraud by a clear preponderance of the evidence is upon the attacking party.

MORTGAGES AS FRAUDULENT CONVEYANCES—PARTICIPATION BY MORTGAGEE.—Although a mortgage is executed by the mortgagor with intent to delay his creditors it is not fraudulent as to the mortgagee, unless he participated in the fraudulent intent.

FRAUDULENT CONVEYANCES—RIGHT OF CREDITOR TO TAKE SECURITY.—A debtor in failing circumstances may prefer one creditor to another by giving him adequate security for his debt, to the exclusion of others.

The right to give such preference necessarily implies the right of the creditor to accept it, and, if he accepts it in good faith, without fraudulent purpose on his part, it is not void on account of the motive prompting the debtor to make it.

INSOLVENCY—DEFINITION OF.—Insolvency, in its general and popular meaning, denotes the insufficiency of the entire property of a corporation or individual to pay its or his debts, but, under bankruptcy and insolvency proceedings, it denotes inability to pay debts as they become due in the ordinary course of business.

CORPORATIONS—INSOLVENCY OF.—So long as a corporation is a going concern, engaged in the conduct of the business for which it was organized, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities, it is not in such a state of insolvency as to preclude it from executing a mortgage on its property, in good faith, to secure a debt of the corporation, though its directors are also liable as sureties or indorsers.

CORPORATIONS—INSOLVENCY OF.—A corporation engaged in the business for which it was organized, although embarrassed and unable to pay its debts at maturity, is not necessarily insolvent, so as to preclude it from preferring one creditor to another by means of a mortgage on its property.

CORPORATIONS—INSOLVENCY—ASSETS AS TRUST FUND.—The entire property of a corporation constitutes a trust fund for the benefit of all its creditors, without preference, only when the affairs of the corporation have reached the point that its managers find themselves obliged to deal with its assets in view of a suspension by reason of its insolvency, but not while it is a going concern, in good faith engaged in the business for which it was organized, although it may be insolvent in fact.

ACTION by Sabin, and other unsecured creditors, against the Columbia River Lumber and Fuel Company, the Commercial National Bank, J. F. Watson, trustee, H. B. Borthwick, C. W. Knowles, and D. J. Moore, directors in the aforesaid company, to set aside certain real and chattel mortgages given by it to Watson as trustee to secure the sum of fifty thousand dollars due the bank, and to set aside an assignment by the company to the bank of its accounts as security therefor, on the ground that the mortgages and assignment were void as to creditors of the company. About thirty-five thousand dollars of such indebtedness consisted of overdue promissory notes indorsed by the directors above named. At the time of the execution of the mortgages and assignment the assignor was indebted to various other persons in the sum of about thirty thousand dollars, in addition to the debt due the bank, and had property of an estimated value of one million dollars. The real estate mortgage, after describing the notes, drafts, and overdrafts intended to be secured thereby, contained the following provisions: "Said conveyance is also intended as a mortgage to secure the repayment to said bank

of any future advances or overdrafts which the said bank may make and allow to the grantor in the conduct of the grantor's business. Now, therefore, if the said promissory notes, and each of them, principal and interest, and the said draft and overdraft above referred to, shall be paid when the same shall become due, or upon demand of payment where so payable, then this indenture shall be void; *provided, further*, that the said grantor, its successors or assigns, shall have paid into the said Commercial National Bank, its successors or assigns, such further sums of money (not exceeding in all the sum of ten thousand dollars), as the said bank may advance to the said grantor, or which may become owing by the grantor to the said bank at any time hereafter during the continuance of this mortgage, with interest on such further sums from the time the same shall be advanced, or become owing as aforesaid, at the rate of nine per cent per annum, payable quarterly. But in case default shall be made in the payment of the principal or interest mentioned in said promissory notes, or either of them, or any part thereof, or in the payment of the said draft and overdraft, and future overdrafts, or any of them, or any part thereof, or the interest thereon, or any part thereof, then it shall become the duty of the said trustee hereinbefore named, upon ten days' written notice and demand therefor, to be given to said trustee by said bank, to foreclose this mortgage as by law provided, and to cause the sale of the said mortgaged premises, or so much thereof as may be necessary to pay the sums due said bank, together with such attorneys' fees as the court may adjudge reasonable for the foreclosure of said mortgage. And whereas it has been, and is hereby, agreed between the Columbia River Lumber and Fuel Company and the Commercial National Bank, and the party of the second part herein, that time in the exact performance of each and every thing herein required or agreed to be performed is of the essence of this contract; now, therefore, if the said Columbia River Lumber and Fuel Company shall neglect or fail to pay all or any of said promissory notes, drafts, overdrafts, or future overdrafts, or any of them, or any part of them, when the same shall become due and payable, or shall fail or neglect to pay the interest upon any of said demands in accordance with the terms of the agreement therefor between the said grantor herein and the said bank, or if the said grantor shall attempt to remove from its said mill any of the machinery or plant

belonging thereto, or shall suffer its property to be attached, then, upon the happening of all or any of said contingencies, the entire indebtedness of said Columbia River Lumber and Fuel Company to said bank shall become at once due and payable, and it shall be the duty of said trustee to so declare the same, and, upon one day's notice therefor to him given by the said bank, to foreclose said mortgage as provided by law, and to cause the sale of said mortgaged property, or so much thereof as may be necessary to satisfy the demands of the said bank against said grantor, together with costs, disbursements, expenses, and attorneys' fees." The chattel mortgages contained the same provisions as the foregoing mortgage in relation to future advances and overdrafts, and then provided that "in case default shall be made in the payment of the said principal sums, or any of them, or interest thereon, or any one of said installments of the principal or interest, or if said property is attempted to be removed by any one from where it is now situated, or be attached, or levied upon by the creditors of the said party of the first part, or shall be sold, transferred, or assigned, or attempted to be sold, transferred, or assigned, then said promissory notes, drafts, overdrafts, and debts shall at once become due and payable, and it shall, and may be, lawful for, and the said party of the first part does hereby authorize and empower the party of the second part, with the aid and assistance of any person or persons, to enter the several places where said personal property may be situated, and such other place or places as the said goods or chattels are or may be placed, and take or carry away the said goods and chattels, and sell and dispose of the same at private sale or at public auction, upon giving one week's notice of the same in any newspaper published in said county of Multnomah, and state of Oregon, and out of the money arising therefrom to retain and pay the said sums above mentioned, and interest as aforesaid, and all charges touching the same, and counsel fees, rendering the overplus, if any, unto the said party of the first part. And it is understood that the party of the second part shall and does take possession of all the personal property described in this instrument, and shall retain the same in trust for the purposes herein expressed, and to that end may appoint any suitable person to hold possession of and care for said property." Judgment sustaining the validity of the

mortgages and assignment, and dismissing the complaint. Plaintiff appealed.

L. B. Cox, W. Minor, and J. N. Teal, for the appellant.

G. H. Durham and E. B. Watson, for the respondents.

22 BEAN, J. The contention for the plaintiff is that the mortgages show on their face that they were made for the benefit of the mortgagor, and were designed to be used as a shield between the corporation and its unsecured creditors, while it prosecuted its business for an indefinite time. It is undoubtedly true that where a mortgage is designed and made for the benefit of the mortgagor, and to enable him to continue in business by placing his property beyond the reach of legal process, it is void as to creditors, although it may be intended in good faith for the ultimate benefit of all the creditors by preventing a sacrifice of the property; and, if such is the legal effect of the instrument, 23 the courts will so declare as a matter of law, for, as was said by the vice-chancellor in *Van Nest v. Yoe*, 1 Sand. Ch. 9: "The law provides that the debtor shall fulfill his obligations, and on his default it gives to the creditor his 'lawful suit' for the recovery of his demand, and the sale of the property of the debtor for its payment. This is a strict right. And the debtor who . . . places his property beyond the reach of the process of the law, whatever may be the pretense under which he cloaks the act, in the language of the statute of frauds, 'hinders,' and 'delays,' and ultimately 'defrauds' his creditors. It is no answer to this argument to say that the debtor provides an ample fund for the payment of the debt, and that the creditor is ultimately to be paid in full. The law gives to the creditor the right to determine whether his debtor shall have further indulgence, or whether he will pursue his remedy for the collection of the debt. The deferring of payment is generally an injury to the creditor; and he may be overwhelmed with bankruptcy for the want of the fund which is locked up by the voluntary assignment of his debtor. It is a mockery to such a creditor to say that the assignment is made for the benefit of creditors."

2. Particular stress is laid upon the fact that provision is made by all these instruments to secure the bank for advances or overdrafts which it might thereafter make or allow the corporation in the conduct of its business. It seems to

us, however, that there is nothing in the terms of the mortgages in question, which, if carried into effect according to a reasonable construction, would of necessity in any way unjustly hinder or delay creditors. From the provision as to future advances it may be inferred that it was the intention that the mortgagor should be permitted to continue in business for its own benefit, yet there is no stipulation in express terms to that effect, or, in fact, that it shall be allowed to continue in business at ²⁴ all, or that the bank shall make any advances, but it is rather a provision that if the bank should see proper to make future advances, such advances should be secured by the mortgages. In this view such provision does not render the mortgages void, and we are bound to construe the terms of the instrument in harmony with honesty and fair dealing, if it can be done without doing violence to the language. The company was at the time in active business, and had an undoubted right to provide by mortgage of its property for future advances: *Hendrix v. Gore*, 8 Or. 407; *Nicklin v. Betts Spring Co.*, 11 Or. 406; 50 Am. Rep. 477. And such a provision does not necessarily render the mortgage fraudulent, although it may subsequently turn out that the mortgagor was, in fact, unable to pay all his debts at the time the mortgage was given: *United States v. Hooe*, 3 Cranch, 73. Every mortgage necessarily tends to hinder or delay creditors other than the mortgagee, but a delay necessarily resulting from a fair and honest exercise of the right to dominion over one's own property, and to pledge or otherwise dispose of it, is neither an unjust nor unlawful interference with the rights of others, and is not within the terms of the statute making void conveyances intended to hinder or delay creditors.

3. Nor are we able to concur with the contention of counsel that the evidence shows the mortgages to be fraudulent in fact. There are some circumstances, it is true, which, unexplained, on their face tend to support this contention; such as, for instance, that the corporation was financially embarrassed at the time the mortgages were given; that the debts were long overdue, and no time is provided in the mortgages for payment; the inference that it was contemplated the company should continue in business at the pleasure of the bank, which is sought to be drawn from the stipulation for future ²⁵ advances, and the restriction imposed upon the trustee to foreclose only when requested by the bank; that the only

possession in fact taken by the trustee was by appointing the agents and officers of the corporation agents for him, and allowing them to sell and dispose of the property, turning into the bank the proceeds, which were credited on overdrafts paid by the bank subsequent to the execution of the mortgages; that no special effort was made by the bank to collect the accounts and bills receivable assigned to it except by appointing and authorizing the officers of the company to do so; that the length of time the bank was to suffer the mortgages to remain unforeclosed was to depend on circumstances, as testified to by its cashier. While these circumstances point with more or less directness to the conclusion that the mortgages were intended to hinder and delay creditors, yet they are all explainable consistently with honesty and good faith. And when it is remembered that the debt for which the security was given was a *bona fide* debt long overdue, and about which the bank had manifested much solicitude; and it was only after repeated and urgent solicitation, and when the company found itself unable to obtain further accommodation at the bank, that it concluded to give the mortgages; that these were promptly filed and recorded, and there was no attempt at concealment, but the entire transaction was open and above board, it seems to us that upon the whole case it cannot be said that the mortgages were not executed in good faith to secure the debt. The mortgages are *prima facie* valid, and to overcome this presumption it is not enough that some of the circumstances attending the transaction may tend to show fraud. There is an essential difference between the material fact of fraud and the circumstances tending to prove it. The burden of proof is on the plaintiff, and the mortgages must be deemed valid until he overcomes the ²⁶ presumption by a clear preponderance of the evidence. The findings of the trial court who heard the witnesses, and was therefore in a better position to judge of the effect and value of their testimony than we are, were in favor of the defendant, and, while the case is not free from doubt, we are unprepared to say that such findings are unwarranted by the testimony.

4. It is claimed there is some evidence which tends to show that one object of the company in giving the mortgages was to hinder and delay creditors by preventing a sacrifice of its property. But it cannot, we think, be successfully contended that the bank participated in the fraudulent purposes of the

company, if any such existed, or had any other motive for taking the mortgages than a desire in good faith to secure its claim; and although it may have known the mortgages would operate to hinder and delay other creditors, and even if it knew the company intended them to have that effect, the transaction will not be void unless the bank participated in the fraudulent purpose of the company: 2 Cobbey on Chattel Mortgages, sec. 771; *Dudley v. Danforth*, 61 N. Y. 626; *First Nat. Bank v. Lowrey*, 36 Neb. 290; *Alberger v. White*, 117 Mo. 347; *Shelley v. Boothe*, 73 Mo. 74; 39 Am. Rep. 481; *Pollock v. Meyer*, 96 Ala. 172; *Ford v. Williams*, 3 B. Mon. 550; *Worland v. Kimberlin*, 6 B. Mon. 608; 44 Am. Dec. 785; *Covanhovan v. Hart*, 21 Pa. St. 495; 60 Am. Dec. 57; *Hodges v. Coleman*, 76 Ala. 103; *Olmstead v. Mattison*, 45 Mich. 617. If a debtor converts his property by sale into money because it is more easily secreted, intending to put it and its proceeds out of reach of his creditors, he of course commits a gross fraud, and one who purchases of him with knowledge of his object in making the sale obtains no title as against creditors, though he may have paid the full price. But the rule is different ²⁷ when the property is taken in payment of, or as security for, a *bona fide* debt, which only amounts to giving one creditor preference over another. In the absence of a statute a debtor in failing circumstances may prefer one creditor to another by giving him adequate security for his debt to the exclusion of others. The right to give such preference necessarily implies the right of the creditor to accept it, and if he accepts the preference in good faith, without fraudulent purpose on his part, it will not be void on account of the motive which may have prompted the debtor to make it. One creditor is not bound to take care of another. He has a right, in good faith, to demand and receive the property of his debtor as security for his debts, though he may know that he will thereby withdraw the means of satisfying other creditors, and though he may know that the debtor thereby intends to hinder, delay, or defraud such other creditors. It is simply a race of diligence in which the law rewards the successful party provided he acts in good faith.

5. It is urged, also, that at the time the mortgages were given the corporation was insolvent, and that the bank knew, or suspected, that it had not sufficient means to pay all its creditors in full, and demanded security for its debt, and thereby obtained an undue advantage over other creditors.

If these conditions actually existed, the validity of the security so taken might well be questioned; but we do not think there was such a condition in the financial affairs of this company as would justify the conclusion that a state of insolvency existed which would preclude the bank from demanding and receiving the security which was given for its debt. It is true that at this time the company was largely in debt, and may perhaps have been insolvent within the meaning of that term as used in the bankrupt or insolvent laws. It was, however, a "going concern," engaged in the conduct of ²⁸ the business for which it was incorporated, and not known or believed by its officers or agents to be insolvent, and with assets exceeding its liabilities by at least twenty thousand dollars, according to the least value placed thereon as appears from the testimony. Such a corporation can hardly be said to be insolvent within the rule sought to be invoked in this case. It is difficult, if not impossible, to lay down a definition of insolvency applicable to all cases. It must necessarily be construed with reference to the facts of each particular case. In its general and popular meaning it is used to denote the insufficiency of the entire property of an individual to pay his debts, but under the bankrupt and insolvency proceedings, which were designed for the benefit of the debtor, it is used in a more restricted sense, and denotes the inability of a party to pay his debts as they become due in the ordinary course of business: *Toof v. Martin*, 13 Wall. 40; *Webb v. Sachs*, 4 Saw. 158. And to this effect are the authorities cited by plaintiff. We are, however, not disposed to apply the rigor of the rule that obtains in bankruptcy proceedings to a case of this character. It often happens that corporations with assets more than sufficient to pay all their debts are unable to meet an outstanding obligation as it matures, and, without undertaking to lay down any definite rule by which the question of the solvency or insolvency of a corporation may be determined, it is sufficient for the purposes of this case to say, that so long as a corporation is a "going concern," engaged in the conduct of the business for which it was organized, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities to the extent shown by the testimony in this case, it is not in such a state of insolvency as will preclude its executing a mortgage on its property, in good

faith, to secure a debt of the corporation, even though the debt may be one for which the directors are security.

²⁹ As the corporation was not insolvent it is unnecessary to examine or decide the question as to the right of an insolvent corporation to prefer creditors, or of a director of such a corporation to secure the debts thereof for which he is personally liable. It follows that the decree of the court below must be affirmed.

Affirmed.

ON REHEARING.

BEAN, J. The opinion in this case is challenged by a petition for rehearing because it is held therein that if the mortgages were taken by the mortgagee in good faith to secure an honest debt, the motive or purpose of the debtor in giving them was immaterial. This question has been re-examined both on this petition and in *Currie v. Bowman*, 25 Or. 364, and the opinion of the chief justice in the latter case renders the further discussion of that subject unnecessary.

It is also challenged because it is substantially held that a corporation engaged in the conduct of the business for which it was organized, although embarrassed and unable to pay its debts at maturity, does not necessarily become insolvent within the meaning of the authorities holding that an insolvent corporation cannot prefer one creditor to another, and counsel say they "are at an utter loss to imagine why the same rule should not be applied in such cases as in bankruptcy proceedings." The reason is manifest. A corporation conducting a business of the magnitude and character of this depends for its very life upon credit. It could not run a single day without it. It must have credit in bank and with those with whom it deals, and to say that it is insolvent within the meaning of the rule invoked because it is unable, by reason of a ³⁰ dull market or other cause, to meet its obligations in the ordinary course of business at maturity, or because sufficient could not be realized from its property at forced sale to pay its debts, would be to deny to such a corporation the *jus disponendi* of its property, and the right to continue in business. In *Corey v. Wadsworth*, 99 Ala. 68, *ante*, p. 29, the court, in defining at what stage of a corporation's affairs it must be pronounced insolvent so as to bring it within the rule prohibiting preferences, says: "It is not enough that its assets are insufficient to meet all its liabilities, if it be still prosecuting its line of business with the

prospect and expectation of continuing to do so; in other words, if it be in good faith what is sometimes called a 'going' business or establishment. Many successful corporate enterprises, it is believed, have passed through crises, when their property and effects, if brought to present sale, would not have discharged all their liabilities in full."

Mr. Thompson, who is an able advocate of the "trust-fund" doctrine, says upon this subject: "The meaning of the doctrine is not that such assets (of a corporation) are in any strict or close sense a trust fund for the creditors of a corporation while it is a going concern. It does not, in any sense, disable the directors from dealing with the assets of the corporation, in the ordinary course of its business, as fully as an individual might under the same circumstances deal with his assets. But its meaning is that, when the line of insolvency is reached or approached, so that the directors can no longer deal with the assets of the corporation in the ordinary course of business, but must deal with them in the contemplation of insolvency and suspension, then the assets become, in the hands of the directors, a trust fund for the creditors of the corporation, and the directors become the trustees of that fund." And, illustrating the doctrine, he puts the case of a bank, ²¹ which, after resisting a run made by its depositors, by payment of their demands over its counters, is finally compelled to suspend, and says: "So long as it did that, it was acting in the regular course of its business; and, in the absence of a statutory prohibition, under all legal conceptions, the preferences obtained by those depositors were honest and lawful, and were made in good faith, because they were made when the directors believed that they would be able to pay all in full." But if, after closing its doors, the directors resolve to single out certain of its depositors and pay them in full, or divide among them what remains, such a transaction would come, he says, within the doctrine prohibiting an insolvent corporation from preferring one creditor to another: 27 Am. Law Rev. 846. It seems to us that the doctrine for which plaintiff contends can only apply, if at all, when that point in the affairs of the corporation is reached where its managers find themselves obliged to deal with its assets in view of a suspension by reason of its insolvency, but not while the corporation is in good faith engaged in the business for which it was organized, although in fact it may be insolvent. This principle is borne out by

Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co., 86 Tex. 143; *Duncomb v. New York etc. R. R. Co.*, 88 N. Y. 1; and *Currie v. Bowman*, 25 Or. 364.

The decision of the lower court is affirmed.

Affirmed.

VOLUNTARY CONVEYANCES, WHEN FRAUDULENT: See *Cole v. Millerton Iron Co.*, 133 N. Y. 164; 28 Am. St. Rep. 615, and note; *Hanson v. Bean*, 51 Minn. 546; 38 Am. St. Rep. 516, and note; *Monaghan Bay Co. v. Dickson*, 39 S. C. 146; 39 Am. St. Rep. 704.

MORTGAGE TO SECURE FUTURE ADVANCES, VALIDITY OF: See *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605; 40 Am. St. Rep. 539, and note; *Penzel v. Brookmire*, 51 Ark. 105; 14 Am. St. Rep. 23, and note.

CORPORATIONS—MORTGAGES—FRAUDULENT CONVEYANCES—INSOLVENCY—PREFERENCES.—As to conveyances generally, in contravention of the laws regulating insolvency, see *Bush v. Boutelle*, 156 Mass. 167; 32 Am. St. Rep. 442, and note. An insolvent debtor, whether a corporation or a private person, may prefer a *bona fide* creditor to the exclusion of others, unless such preference deprives the corporation of the power to continue in its due course of business, and renders it necessary for it to suspend: *Larrabee v. Franklin Bank*, 114 Mo. 592; 35 Am. St. Rep. 774, and note. The question of lawful and unlawful preferences is discussed in *Benham v. Ham*, 5 Wash. 128; 34 Am. St. Rep. 851, and note. To avoid a conveyance it is not necessary for the debtors to have known that they were insolvent, or to have in fact contemplated proceedings in insolvency. It is enough that they were in fact insolvent, and had no reasonable ground to believe themselves solvent: See note to *Jones v. Howland*, 41 Am. Dec. 531. That an insolvent corporation cannot prefer one creditor to another, see *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493; 15 Am. St. Rep. 644.

CORPORATIONS—ASSETS OF, AS A TRUST FUND.—The authorities are divided on the question as to whether the assets of an insolvent are a trust fund for the benefit of the corporation creditors: See *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493; 15 Am. St. Rep. 644, and note; *Thompson v. Huron Lumber Co.*, 4 Wash. 600; *Hollins v. Brierfield etc. Co.*, 150 U. S. 371; *Brown v. Grand Rapids etc. Co.*, 53 Fed. Rep. 286; *Gould v. Little Rock etc. Ry. Co.*, 52 Fed. Rep. 680.,

The case of *Currie v. Bowman*, 25 Or. 364, was a suit brought by Currie as receiver of the Durand Organ and Piano Company against Bowman to have certain chattel mortgages executed by the president and secretary of the company in favor of Bowman, without lawful authority, adjudged fraudulent and void, as against the creditors of the company, to compel Bowman to account for and pay over the proceeds of sales of the mortgaged property to such receiver, to surrender any part thereof remaining in his hands unsold, together with certain notes payable to the order of the company, and retained by him in fraud of the rights of such company, and its creditors, together with contracts for musical instruments sold and fraudulently retained by him, and to pay over any money collected on such notes or contracts to the receiver; to surrender certain policies of insurance upon the life of Ezra Durand assigned to the defendant as collateral security for money loaned, and for a general accounting.

On or about December 1, 1891, E. Durand, as president of such company,

was authorized by resolution of its board of directors "to indorse and transfer, on behalf of the company, any notes, contracts, leases, or other obligations belonging to the company, for the purpose of borrowing money, or selling the same to such persons, and upon such terms as he shall think best." This resolution appeared on the minute-book of the company with the words "mortgage" and "property" interlined therein in the same handwriting as the original resolution.

Some time in December, 1891, E. Durand, as president, and D. J. Durand, as secretary of said company, executed a chattel mortgage, under the seal of the company, upon its stock of goods to secure a loan from Daly & Son of about nine thousand dollars.

On or about January 25, 1892, the defendant loaned the company ten thousand and eighty-three dollars and seventy-five cents with which to pay the Daly mortgage and certain dishonored checks drawn by the company. On the same day the president and secretary of the company executed two chattel mortgages to the defendant upon the stock of goods, musical instruments, and fixtures of the company, to secure the amount advanced by him and the payment of a further indebtedness to him in the sum of ten thousand dollars, for which he held the notes, contracts, and policies of insurance before mentioned.. These mortgages were duly recorded and the company thereafter continued to do business until January 29, 1892, when the defendant took possession of the property mentioned in his mortgages, and proceeded, with the knowledge of the company and its directors, to sell and dispose of such property. Neither the company nor its directors took any steps to prevent such sale, or to disaffirm the execution of the mortgages, nor to repay the money loaned which had gone into the business, nor to do any thing in reference thereto until several months later, when this action was commenced. The only authority vested in the president of the company to execute the chattel mortgages in dispute was contained in the interlined resolution before referred to, and all of the directors of the company denied that any such authority was intended to be conferred by the resolution, or that any thing was said in reference thereto at the time of its adoption, or at all. The supreme court, in deciding the questions presented, was of opinion that the mortgages were executed without the necessary specific authority from the board of directors of the company, but that the company became bound by them by the acquiescence of said board, when ordinary business care would have revealed their execution, and the board, with knowledge of its general agent's act, had taken no steps to disaffirm his assumed authority, or to repudiate the mortgages until after the lapse of several months. The court also said, in passing upon the validity of the mortgages as to creditors, that "the next objection is that the chattel mortgages were fraudulent and void as against creditors. The defendant contends that they are shown, by the evidence and circumstances attending the transaction, to have been made and executed on the part of the president of the company with the intent to hinder, delay, and defraud its creditors, and that the defendant actively participated in such intent. This contention proceeds upon the idea that the object of Durand, as president, in making such mortgages, was to put the property under cover, so that he could carry on the business and hold the other creditors off for an indefinite period, and that the defendant, having knowledge of such purpose, aided him in its execution. At the time the mortgages were taken the company was actively engaged in business, and had been for several years. It is probable, in the light of subsequent

events, that it never was solvent, and its collapse was only a question of time. Now that the character of its president stands revealed he seems to have been an adventurer, adroit and unscrupulous, full of confidence in himself and the successful accomplishment of his business plans, which, in some instances, involved actual criminality; yet when these transactions took place he had been president of the company for several years, and under his management it had done a large business in selling goods and borrowing money, which indicated that it was generally regarded by the business community as solvent, and that its manager possessed their confidence. He had borrowed large sums of the defendant at different times, and the circumstances under which the mortgages in question were made and taken has already been detailed. There is no doubt that the defendant was anxious to make himself secure; the previous indebtedness of the company to him, and the sum to be advanced to pay Daly & Son, were large, and in all his prior transactions with the president he had required collateral security for loans. There was, therefore, nothing out of the usual order of affairs in his taking security, and, as the Daly & Son indebtedness was secured by a mortgage, it could hardly be expected that he should relinquish such security, or do otherwise than he did in the exercise of ordinary business prudence. It may be true that the fact of the mortgage covering the entire property suggested to his mind that the company was in failing circumstances, and, even if it did, it would be nothing more than ordinary business caution for him to secure himself against loss; and, if in so doing, he acted in good faith, the transaction was not fraudulent. It is only when the mortgage is given and received with the intent to hinder and defraud creditors that it is void, and not when it is taken by the mortgagee for the honest purpose of securing a valid claim or indebtedness. It may be that Durand knew the business of the company must collapse sooner or later; yet his conduct indicates that when these transactions occurred he thought he would be able to meet the obligations of the company to the other creditors, and carry on the business for some time at least. But, however that may be, even if we assume that his object in making the mortgages was to hold off his creditors, unless the defendant participated in that purpose or connived at his design to hinder and delay them, such mortgage would not be fraudulent or void.

"The statute, section 3053 of Hill's Code, avoids the mortgage or conveyance when it is made and taken by the parties to it with the intent to hinder and delay the creditors of the mortgagor. It is the purpose of the conveyance to which the statute has reference, and hence it is the intent or purpose of the parties in giving and receiving the mortgage which constitutes the test of its validity. It is not enough that the claim or debt secured by the mortgage may be valid, although that circumstance is an important factor in the transaction, if such mortgage was made and taken by the parties with intent to hinder or delay creditors. Now, although the defendant may have thought that the company was in failing circumstances, and that its president sought by the mortgages to hold off its creditors until its financial difficulties could be tided over, yet, if the mortgage was valid on its face, and accepted by the defendant without any secret trust, or any understanding in furtherance of such object, or connivance or participation in such fraudulent intent, but for the purpose of securing the payment of the debt, such mortgages are not fraudulent or void. The mere fact that hindrance and delay would necessarily result

from the execution of such mortgages would not render them fraudulent. Every mortgage upon the property of the debtor necessarily tends to hinder and delay creditors, and especially so when it covers the entire property of the mortgagor, as in that case its effect would be to deprive other creditors of all means of obtaining satisfaction of their equally meritorious claims; yet, if the mortgage was received by the creditor in good faith, to secure the payment of a valid debt, the delay and hindrance necessarily arising therefrom is not a fraudulent hindrance in the sense of the law. This results from the fact that it is lawful for a debtor to prefer one creditor to another, or to secure one and leave another unsecured; notwithstanding his motive may be to prevent his other creditors from collecting their demands, the delay or hindrance occasioned thereby to such creditors is not within any legal prohibition. The reason is that, where there is a valid debt and a real transfer, there is no ground upon which to predicate collusion or fraud.

“To avoid a mortgage or other conveyance as fraudulent and void, there must be a real design on the part of the mortgagor, in which the mortgagee participated, to withdraw his property from the claims of his creditors. The real question there is whether the president of the company made the mortgages in question with intent to defraud, delay, or hinder its creditors, and whether the defendant accepted them with knowledge of that design, and with intent to promote its accomplishment. There was some evidence tending to show that the president of the company thought, or expected, that if he could procure a loan from the defendant whereby he would be able to liquidate the mortgages to Daly & Son, who were demanding payment, and at the same time secure the defendant by a mortgage upon the stock of goods, it would enable him to tide the company over its difficulties, and hold off its other creditors until he could make some other arrangements for paying them, which he contemplated. If Durand had in mind, beyond securing the indebtedness to defendant, the purpose to use the mortgages as a cover to withdraw the mortgaged property temporarily out of the reach of the company's creditors, he could not make such purpose effective without consent and co-operation of the defendant, and there are no facts or circumstances tending to show that the defendant connived at, or participated in, such purpose, or that the mortgages were taken with the secret understanding that they should be used as a means to hold off or baffle other creditors. The anxiety of the defendant to secure his demand and the money which he advanced to pay off the Daly & Son mortgages shows that in the race of diligence he was vigilant and attentive to his own interests; but there are no facts or circumstances connected with the transaction which satisfy us that the defendant connived at, or participated in, any fraudulent design that Durand may possibly have contemplated. If the mortgages appropriated only a fair amount of property as security for the indebtedness, although it was all the property of the company, the fact that the defendant may have known that Durand, in making such mortgages, had the design to hinder and delay other creditors, would not vitiate them, if the defendant did not accept them with the intent to aid him in such design, but solely to secure the payment of his claim against the company. Mr. Bump says a creditor ‘does not violate any principle of the statute when he takes payment or security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims, and though he may be aware of the intent of the debtor to defeat the collection of them. Fraud, in its legal sense, can-

not be predicated of such a transaction. Wherever there is a true debt and a real transfer for an adequate consideration there is no collusion': Bump on Fraudulent Conveyances, 2d ed., 187.

"3. A debtor has a right to secure a creditor, and, if he does so by giving a mortgage, it is what the law admits to be rightful, although the effect will be to hinder other creditors, and he so intends; yet, if such mortgage is accepted in good faith, it is not a fraudulent hindrance, because the debtor has not disposed of his property in a way to prevent its application to the satisfaction of his *bona fide* debts: *Sabin v. Columbia Fuel Co.*, 25 Or. 15; *ante*, p. 756. To hold otherwise would be to establish as a rule what Black, C. J., says, 'requires a man to take care of his neighbor's interest at the expense of his own,' and which he thinks 'is utterly impracticable in the present state of human society': *Covanhovan v. Hart*, 21 Pa. St. 501; 60 Am. Dec. 57. As the company was carrying on its business with the expectation of its continuance at the time when these transactions occurred, and was what is sometimes called a 'going concern,' we have not deemed it necessary to consider the question as to the right of an insolvent corporation to prefer creditors.

"4. The mortgages contain no power of sale in the mortgagor for his own benefit, nor is there any thing therein which the court can say is unlawful. The mortgagor is allowed to remain in possession of the goods, but he is required to keep a strict account, and pay over the proceeds, less the expenses of the business, to the defendant; and it is perfectly evident that by honest conduct under these mortgages there could be no fraudulent result. The facts show that the president of the company did account for and pay over the proceeds of the stock some time between the 9th and 29th of January, 1892, and furnished written statements of sales made for cash, and of some few small goods that were sold on credit, and these latter sales being contrary to the terms of the mortgages, the defendant became dissatisfied, and on the last-named date took possession of the stock of goods, and proceeded to sell and dispose of it. The record discloses the amount of sales made by him, and the stock remaining on hand and under his control when the present suit was commenced. The fact that the sales of a few small goods were on credit and the failure to render proper accounts, thereby violating the terms of the mortgage, gave rise to the inference that the president was allowed to remain in possession of the goods, and to use the proceeds for his own benefit; but the evidence shows that Durand remained in possession only about twenty days, and that, as soon as the defendant discovered that the accounts were not kept as they should be, he took possession of the stock. Under these circumstances we do not think that the sales of these small goods, which brought but a trifling amount, ought to operate to render the mortgages void. The defendant was vigilant, and his conduct indicated that he intended that the terms of the mortgages should be strictly observed, and that any departure therefrom would not be tolerated. We think, therefore, that the mortgages were valid, and constitute a lien on the property, and that the defendant is entitled to hold and retain the same, and the moneys arising therefrom, until the company's indebtedness to him is fully paid."

LEWIS v. CITY OF PORTLAND.

[25 OREGON, 133.]

DEDICATION OF STREETS BY REFERENCE TO MAPS—ESTOPPEL.—An owner of a tract of land who conveys lots therein by reference to a name under which the land is platted is not estopped from denying that a certain strip of land therein has been dedicated as a street, simply because a lithographic map in general circulation shows such strip to be a street, if it is not shown that such owner ever knew of, or recognized, such map in making the conveyances, or otherwise.

DEDICATION OF STREETS BY MAP OR PLAT.—A landowner who, having made a town plat of a portion of a tract of land showing that a certain strip designated thereon is not a street, afterwards plats an addition, and, for the purpose of showing the relative position of the land last platted to the first, extends the lots, blocks, and streets of the first plat in blank on the addition, showing such strip to be a street, does not thereby dedicate it as a street, as it was not the intention of the owner at the time of filing the additional plat to alter or affect the prior plat or map.

DEDICATION OF STREETS—INTENTION.—A dedication of land to a public use, as a street, rests on the intention or assent of the owner, and, when the evidence of such intention rests in parol, it must be so clear and satisfactory as to indicate a positive and unmistakable intention to devote the property to such public use.

DEDICATION BY USER.—A user by the public for over twenty years of a passageway to a wharf and warehouse, the owner always controlling, claiming to own, and keeping one end of the way inclosed, does not constitute a dedication to a public use, because such use by the public is not inconsistent with private ownership.

TIDE LANDS—RIGHTS OF STATE.—Upon the admission of a state into the union it acquires an absolute property in, and dominion over, all soils under tide water, with the right to dispose of the title to them, free from any easement of the upland owners therein, and subject only to the paramount right of navigation and commerce.

WHARVES.—VESTED RIGHTS IN—RIPARIAN OWNERS ON NAVIGABLE RIVERS who have built wharves out to navigable water in front of their land, under permission and license from the state, have rights of private property therein which cannot be taken for public use or otherwise without due process of law and compensation therefor.

ACTION by C. H. Lewis, H. F. Allen, Mary H. Couch, G. H. Flanders, and W. S. Ladd, against the city of Portland, and others, to restrain them from taking, for a public use, without compensation, a strip of land at the foot of Burnside street, and using it as an abutment for the end of a bridge to be constructed across the Willamette river. The following facts were stipulated: "1. That the land in controversy is situated within the corporate limits of the city of Portland, Oregon, and is part of the wife's half of the donation land claim of John H. Couch and Caroline Couch, his wife; 2.

That John H. Couch died in January, 1870, and Caroline Couch in July, 1885; 3. That plaintiffs are the owners of the land in controversy, and running to high-water mark in the Willamette river, unless it shall be found that said land is a public street; 4. That on the nineteenth day of January, 1865, the said John H. Couch filed in the clerk's office of the county of Multnomah for record a map purporting to be a map of Couch's addition to the city of Portland, and purporting to dedicate the streets and alleys marked thereon to the use of the public, which map comprised a plat of land included wholly within the limits of Caroline Couch's half of said donation land claim. A copy of said map is attached and marked exhibit "A"; 5. That on the twenty-second day of June, 1869, the said John H. Couch filed in the said clerk's office for record a map designated thereon as a map of an extension to Couch's addition to the city of Portland, comprising a part of land partly within said Caroline H. Couch's half of said claim, and partly within John H. Couch's a copy of which map and the writings thereon are attached and marked exhibit "D"; 6. That John H. Couch filed, in the year 1869, a map purporting to be a map of an extension of Couch's addition, and that lots and blocks, or parts thereof, embraced in said extension were sold by John H. Couch and wife to various persons between the date of the filing of said plat and the plat subsequently filed by Caroline Couch and the heirs of John H. Couch, on the — day of November, 1872, plaintiff, however, not waiving proof of the sale of any lots or blocks on said Burnside street between said dates; 7. That on the sixteenth day of November, 1872, Caroline Couch, the widow, and — heirs of said John H. and Caroline Couch filed a map in said clerk's office for record, purporting to be a map of Couch's addition to the city of Portland, and purporting to dedicate the streets marked thereon to the use of the public, which map comprised land partly said Caroline's half of said claim, and which map is attached and marked exhibit "C." That after June 15, 1872, the widow and heirs of John H. Couch conveyed sundry lots and blocks shown on said maps, describing them as being "in John H. Couch's addition to the city of Portland . . . according to the maps and plats of said Couch's addition," and that some of the property so conveyed first appeared as lots on the map of 1869, exhibit "D"; and further, that between 1859 and 1869

Captain Couch and wife signed and delivered to purchasers of lots in said tract a number of deeds wherein the property conveyed was similarly described." Judgment for plaintiffs, and the defendants appealed.

J. V. Beach, M. L. Pipes, J. W. Whalley, and R. S. Strahan, for the appellants.

G. H. Williams, C. E. S. Wood, S. B. Linthicum, and J. C. Flanders, for the respondents.

¹⁴⁹ LORD, C. J. 1. Before proceeding to a discussion of the questions involved it may be said that this strip is in Caroline Couch's half of the donation claim, and though there is some evidence that there was a plat made of an addition to the city of Portland by John H. Couch in April, 1850, there is nothing to show that the *locus in quo* was dedicated as a public street therein; and, even if there was, such plat having been made before the donation law was passed, it would not have the effect of constituting a dedication. Any person who should subsequently acquire the title from the government or its grantees had a right to revoke such dedication, and subject the property to his private use. Nor is there evidence that Couch or his wife, prior to 1859, the date of the McCormick map, ever made any map on which the *locus in quo* was platted as a street.

2. To establish the proposition that the land in question has been dedicated as a public street defendants introduced in evidence two plats and maps of Couch's addition to the city of Portland. The first one is a lithographic ¹⁵⁰ map of Portland, dated 1859, made by S. J. McCormick. It shows that Burnside street extends to the river, and thus includes the strip of land in dispute. The second map was made by John H. Couch on the twenty-second day of June, 1869 (exhibit "D"), and purports to be an addition to Couch's addition which latter had already been laid out. It also shows that Burnside street extends to the river. On the other hand plaintiffs have introduced two maps of Couch's addition to the city of Portland, one made by John H. Couch in 1865 (exhibit "A"), and the other made by Caroline, his widow, Caroline E. Wilson, Clementine F. Lewis, Elizabeth R. Glisan, Mary H. Couch, his heirs, and George Flanders and Maria L. Flanders, on the fifteenth day of November, 1872 (exhibit "C"). Both these maps show that Burnside street terminates at the west side of Front street, and that the strip

of land in controversy is private property. It thus appears, so far as the maps and plats are concerned, that the two introduced by the defendants show that Burnside street extends to the river, while the two introduced by the plaintiffs show that it terminates at the west side of Front street. As to the lithographic map of 1859, there is no evidence to show, nor is it claimed, that John H. Couch or his wife signed or acknowledged or had any thing to do with making it. The point upon which the defendants mainly rely in respect to such map as showing a dedication is that it was in general use in the city, and the only public map referring to Couch's addition from 1859 to 1865, during which time John H. Couch and his wife made certain deeds in which the lots were described by reference to "Couch's addition to the city of Portland." ¹⁵¹ It is argued that the reference in these deeds to Couch's addition, under the circumstances, was intended to refer to such addition as platted on said map, and was therefore a recognition of it, and, in legal effect, a dedication of the streets as platted thereon. We are unable to assent to this inference. The admitted facts show that the strip of land in dispute belonged to Caroline Couch as donee of the United States, and that it was conveyed to the plaintiffs Allen & Lewis and Flanders, together with certain lots, some time in 1854, and that they are now the owners and entitled to the possession of it, unless the public has acquired an easement therein as a street. It is probable that, after they acquired the title from the United States, Couch and his wife may have continued to use a prior map, exhibiting it to intending purchasers, and selling their lots with reference to it, but there is nothing to show that Couch or his wife ever recognized the McCormick map, or that they ever saw it, or knew of its existence. In fact it does not purport to be a map of Couch's addition to the city of Portland. In view of these considerations we do not think that the reference in their deeds to "Couch's addition" was intended to refer to their property as platted on the McCormick map.

3. It is not this, however, but the map of 1869, upon which the defendants mainly rely as establishing a dedication of the *locus in quo* as a public street. It is claimed that all the plaintiffs, except Mr. Allen, made deeds conveying lots with reference to this map. All that can be said in support of this claim is that these parties made certain deeds, referring therein for description to the "map of Couch's addition to

the city of Portland." But inasmuch as Couch had made a map in 1865, upon which the *locus in quo* was not platted as a ¹⁵² part of Burnside street, even if we assume that the map made by him in 1869 platted it as a part of such street, there is nothing to show whether the general reference in these deeds was to the map of 1865 or 1869. Mrs. Couch, during the time that she was the owner of the land in dispute, never made any maps or plats dedicating it as a public street, nor had any of the plaintiffs. The maps and plats made by John H. Couch, after he and his wife had conveyed this land, as already stated, to the plaintiffs Allen & Lewis and Captain Flanders, would not bind them, unless they accepted and acted upon such maps, and there is no evidence that they accepted and acted upon the map of 1869, other than the mere fact that they made certain deeds in which they described the property by reference to the "map of Couch's addition to the city of Portland," which reference was as likely to be to the map of 1865, or to some prior map of which there was some evidence, as to that of 1869.

It is sought, however, to obviate this objection by showing that some of the deeds conveyed lots and blocks that were for the first time platted on the map of 1869, or, in other words, that such deeds conveyed lots and blocks that appear on no other map, and hence it is argued that the reference to them was necessarily to the map of 1869, which, it is claimed, shows that the property in dispute was a part of Burnside street. It is true that such lots and blocks did not appear on any other map, for the reason that the map of 1869 was intended as an addition or extension of prior maps, but this affords no justification for the assumption or argument that such map, made by John H. ¹⁵³ Couch, shows a dedication of the *locus in quo* as a public street. Before, however, it can be assumed that his wife recognized the map of 1869, by joining with her husband in such deeds, as showing a dedication of her property, so as to bind or estop her, such map itself ought to show the dedication so distinctly and positively as to make the evidence of her intention to divest herself of the title entirely clear. The map itself does not purport to be any thing more than a map of the extension of Couch's addition to the city of Portland. The lots and blocks laid out on it, which constitute the new addition, are designated and marked by a coloring of yellow, and all the other property, except a tier of blocks adjoining such yellow portion, is

left blank. This indicates that the map of 1869 was not intended to affect the prior maps. Its object was to plat a second addition, and to show its position relative to the first one. The numbering of the lots and blocks, and the dedication of the streets outside of the extension, were to remain as plated on the prior maps. This must be so, as it is impossible to convey any lots or blocks by reference to such map, outside of the extension, because they are left in blank, and hence deeds referring to lots and blocks as numbered by map of 1869 necessarily referred to it, and did not appear on any other map, because such lots and blocks composed the new addition or extension of prior plats, but, as we have shown, the other portion of such map negatives the idea that it was intended to change the map of 1865, or prior maps, or that it undertook to represent the *locus in quo* as a part of Burnside street. This view is confirmed by the form of acknowledgment to this map, which reads, in its material parts, as follows: "That he recognized the accompanying diagram or plat as a true and correct ¹⁵⁴ description of lots and blocks laid out by him as an addition to the city of Portland." This, of course, means the lots and blocks laid out on this map as a new addition, indicating that the added blocks copied from prior maps were only intended to show their relative position to such new addition, and not to alter or affect the prior maps. We do not think, therefore, that any representations as to Burnside street upon that portion of the map left in blank—such portion constituting no part of the addition—can be construed as intending to make a dedication of the *locus in quo* to affect the prior maps.

The map of 1872 is the only one that Caroline Couch or the plaintiffs ever signed, and it shows that the property in question is not a part of Burnside street. This map corresponds with that of 1865, and, as we construe it, is not in conflict with the map of 1869. We do not think, therefore, that such deeds as were made of lots and blocks which appear only in the map of 1869 was a dedication of the *locus in quo*, or that they can be reasonably construed to be a recognition of any dedication thereof. In thus holding we do not controvert the principle that where a proprietor recognizes a plat in making a sale of lots he will be estopped to deny a dedication of the streets designated upon the plat embracing his property, but we do not think, in view of the facts, that such principle can be applied to the case at bar.

4. The second defense is dedication by user. It is claimed by the defendants that the *locus in quo* has been used by the public, with the consent of the plaintiffs, the same as other streets similarly situated have been used, for more than twenty years, and that therefore the public has a prescriptive right to the same. A dedication of land to the public use rests on the intention or assent of ¹⁵⁵ the owner. As it is purely a question of intention, the evidence of it, when resting in parol, must be clear and satisfactory, and indicate a positive and unmistakable intention to devote the property to public use. All the authorities agree that the acts and conduct of the owner, when relied upon to show the dedication of his property, must be deliberate and unequivocal, manifesting a clear intention to abandon such property to the public use. The burden of showing it rests on the defendant. The security of titles requires that the evidence of dedication, when depending on parol proof, should be of such a deliberate and decisive character as to leave no doubt of the owners' intention. Hence the rule is well settled by numerous authorities that before there can be a valid dedication there must have been an actual intention, clearly indicated, by deliberate and unequivocal words or acts, to dedicate the property to the public: *Hogue v. Albina*, 20 Or. 185.

5. It appears from the testimony that some time in 1854, and soon after the plaintiffs Captain Flanders and Allen & Lewis bought the property, they built a wharf in front thereof for ocean vessels and river craft; that it was one of the first wharves built in the city, and for many years was the principal landing for such vessels; that it has been maintained there continuously ever since, although it has been rebuilt several times, and extensions added. The wharf extends across the *locus in quo*, and out from the bank of the river about one hundred feet to the navigable water of such river, and is seven hundred feet in length. A roadway or street was left open from the east side of Front street to the wharf, for the purpose of ingress and egress. The wharf opposite the street is two story, and at the time it was built the plaintiffs last mentioned constructed an elevated passageway twenty feet wide on ¹⁵⁶ the north side of this roadway, from Front street to the upper story, and inclosed the space underneath, and used it for a stable and storehouse. This roadway or street has been used by the public and plaintiffs as a means of conducting and carrying on the business appertain-

ing to this wharf and warehouse, and the facts indicate that it has not been used for any other purpose. The plaintiffs have at all times maintained their right to the *locus in quo* consistent with its use as a passage or roadway to and from their wharf, and the use of it by the public for such purpose was not under a claim of right, but by their permission. The city authorities have not exercised any acts of ownership over or assumed any right to control it; nor has the city made any improvements or performed any work upon the same by way of repairs or otherwise, but the evidence shows that the plaintiffs have used and occupied such property to the exclusion of the public, except so far as was necessary for the public to use it in doing business at their wharf. The evidence also shows that the plaintiffs have asserted their ownership of the land in controversy by acts and declarations which are entirely inconsistent with any intention to abandon or dedicate it to the public use. They have used it for the storage of iron, brick, and other heavy freight; they have improved and repaired it; they have kept a gate across it for ten or twelve years; exercised the right to exclude persons or teams from it whenever they chose to do so; they have publicly and repeatedly, in connection with the use of the property, declared that it was not a public street, but a private way to their wharf and warehouse.

In *Irwin v. Dixon*, 9 How. 10, in which the facts are similar to the case at bar, the court says: "From the very nature of wharf property, likewise, the access must be kept open for convenience of the owner and his ¹⁵⁷ customers, but no one ever supposed that the property thereby became public instead of private. . . . No length of time during which property is so used can deprive an owner of his title. . . . While any one might be allowed to travel over this space from the warehouse to the wharf and river, when convenient and not interfering with the owner, it would not be because it had been intended to give to the public a right of way over these premises, but because he himself intended to travel over it, and while so doing and so leaving it open would not be captious in preventing others from traveling there." The same principle is laid down in the note to *Doraston v. Payne*, 2 Smith's Lead. Cas. Hare & Wallace's notes, 155, wherein it is said: "If, therefore, a person opens and uses a space upon his own land as a road for his own convenience and purposes, the mere fact that the community are

allowed to make use of it in common with him for even twenty or thirty years will not constitute a dedication of it to the public use, especially in the face of declarations on his part inconsistent with an assent to such dedication." So that the use of the *locus in quo* by the public in the manner referred to is entirely inconsistent with the ownership of the plaintiffs, and therefore the public have not acquired a prescriptive right by user to the land in controversy.

6. The next question to be determined is as to the right of the plaintiffs to erect and maintain a wharf at the *locus in quo* extending to the navigable water of the Willamette river. The contention for the defendant is that the title to the soil under the Willamette river is in the state by virtue of its sovereignty, and that riparian owners, without a license or grant from the state, have no authority or right to maintain a wharf beyond the ordinary high-water mark. Hence, they claim that, if the plaintiffs have erected their wharf and extended it ¹⁵⁸ over the submerged soil of such river to its navigable waters without any license from the state, they have erected a *purpresture* which may be abated, or removed as a common nuisance. The theory of their argument is that in this country the law as to navigable fresh water is the same as to waters moved by the tide; that, in either case, the state, by virtue of its sovereignty, is the owner of the subjacent soil of its navigable rivers, including tide lands or submerged lands contiguous to deep water; that as such owner it has the right to regulate the use of such lands, or to dispose of them in any way that will not impair or injuriously affect the public interests in such rivers, especially for purposes of navigation and commerce, free from any easement of the upland owners, who can only acquire the right to extend a wharf over them by its consent, obtained by legislation or acquired by acquiescence through local usage; and that, as a consequence, unless the plaintiffs, as riparian owners, have obtained the consent of the state to extend their wharf over the submerged soil of the Willamette river to the point of its navigability, they cannot be considered as having any right in the premises which the state is bound to respect; nor can their wharf be recognized as a legal structure, the taking or condemnation of which for a public use would entitle them to compensation as for private property.

By the common law, in England, the title to the shore of the sea, and the arms of the sea, and the soil under tide

water, is vested in the king, who has a proprietary interest therein which he may grant or dispose of, subject to the public use for navigation and commerce. "The *jus privatum*," says Lord Hall, "that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to the public use": De ¹⁵⁰ Jure Maris, 22. The soil so vested in the king can only be transferred subject to the public trust. In this country the state has succeeded to the ownership and sovereignty over such lands, charged with a like public trust; and the law is now regarded as settled that the state, by virtue of its sovereignty, is regarded as the owner of lands covered by tide water, and, as an incident of such ownership, has the right to use or dispose of them in such way as will not impair or prejudice the public interests or privileges, such as fishing, navigation, and commerce. As touching this subject, Mr. Justice Field said: "Upon the admission of California into the union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soil in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations, or among the several states, the regulation of which was vested in the general government": *Weber v. Harbor Commrs.*, 18 Wall. 65. And in *Bowlby v. Shively*, 22 Or. 410, in conformity with our previous adjudications, it was held that when the state of Oregon was admitted into the union the tide lands became its property, and subject to its jurisdiction and disposal; that, in the absence of legislation or usage, the common-law rule would govern the rights of upland proprietors, and by that law the title to such lands is in the state; that the state has the right to use or dispose of its title in such manner as it might deem best, free from any easement of such upland owners therein other than such as the state might choose to resign to them, subject only to the paramount right of navigation, and the uses ¹⁶⁰ of commerce. The same rule has been extended to our great fresh-water lakes, which, owing to the extended commerce conducted upon them, are treated as inland seas; and also, in some of the states, to the great fresh-water rivers which are navigable in

fact, as the Mississippi, the Missouri, the Ohio, and, in the state of Pennsylvania, to all its permanent rivers; such rule depending on the law of each state as to what waters, and to what extent, the prerogative of the state over the lands under water shall be exercised. The question, as Mr. Justice Bradley said, is one for the several states themselves to determine. "If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity it is not for others to raise objections": *Barney v. Keokuk*, 94 U. S. 324. So it appears that the same rule as to the ownership of, and the sovereignty over, lands under the navigable waters of the great lakes and fresh-water rivers applies which obtains at common law as to the ownership of, and sovereignty over, lands under tide waters, and that such lands are held by the same right in the one case as the other, and subject to the same trusts and limitations: *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 436.

7. In respect to the tide lands, the state, as owner, has provided by legislation for their sale and disposal free from any right of the upland owners therein, except such as it saw fit to recognize in them, or their grantees, in consideration of the fact that prior to such legislation the tide lands had often been dealt with by the adjacent owners as private property, subject, however, to the paramount right of navigation and the uses of commerce: *Bowlby v. Shively*, 22 Or. 410. But in respect to navigable fresh-water rivers in this state there has been no legislation for the sale or disposal of any portion of the submerged lands lying between the upland and ¹⁶¹ navigable waters. Such lands, so far as any legislative action is concerned, have not been treated by the state in the proprietary way which it has asserted and applied to the tide lands; and some of the decisions of its courts recognize certain rights in the riparian owners, arising from adjacency, which do not belong to them in common with the public. In *Minto v. Delaney*, 7 Or. 337, it was held that the river is the boundary of lands lying along the Willamette, and that accretions formed on the shore by the gradual receding of the water belong to the riparian owner; and in *Moore v. Willamette Transp. Co.*, 7 Or. 357, that rocks and shoals along the margin of the same river belong to the riparian owner. While, therefore, the state, as the owner of the submerged lands of navigable fresh-water rivers has not treated its proprietary interest in any portion of them as subject to sale

or disposal, it has recognized certain rights in the riparian owners, not common to the public, in the shoal water in front of their lands.

It is common knowledge that before and after the state was admitted into the union the riparian owners along the navigable fresh-water streams within its limits acted on the assumption that the right of wharfage was incident to their land, and built wharves in front thereof. Some of these wharves, like the plaintiffs', are expensive structures, and of great advantage and benefit to commerce. Nor is this all. Upon the tidal waters such owners, believing that the tide lands adjacent to their uplands belonged to them, built wharves over the same, and dealt with them as private property. This condition of things was recognized in the legislation referred to (Laws 1876, p. 70), and in consideration thereof, and as an act of justice, a preference was given to the riparian owners in the provisions for the sale of such land, "though the state was under no legal obligation to recognize the ¹⁶² rights of either the riparian owner or those who had occupied these tide lands," as Boise, J., said, "still the legislature, considering the fact that these lands had been dealt with as private property, and improved sometimes by the erection of expensive structures which were a great advantage to commerce, made what we think wise and just provisions for the protection of those who had spent their money in purchasing and improving these lands, which improvements were in many cases absolutely necessary as aids to commerce": *Parker v. Rogers*, 8 Or. 190. All this goes to show that the custom which obtained of building wharves along the navigable rivers of the state by riparian owners was fully understood, and that there was no intention to interfere or obstruct the right to wharf across the submerged lands on nontidal or fresh-water rivers, but that the act was only designed to provide for the sale of tide lands on tidal waters, the effect of which was inconsistent with any easement or right of the upland owner therein not granted to him in such act. This becomes all the more apparent by the proviso in the tide land act (Laws 1876, p. 70), which provides: "That the Willamette, Coquille, and Coos rivers shall not be deemed rivers in which the tide ebbs and flows, within the meaning of this act, . . . and that the title of this state to any tide or overflowed lands upon said rivers is hereby granted and confirmed to such owner of the adjacent

lands." This grant conveyed the title to all such lands along these rivers, whether tide or overflowed, to the riparian owners, subject to the public trust. As the Willamette is a fresh-water river, and only slightly affected by the tides a short distance from its mouth, there is no tide land at Portland, as held in *Andrus v. Knott*, 12 Or. 501, and therefore it results that if the submerged or overflowed lands described in the act include such as are not affected by the tides, and lie between ¹⁶³ the upland and navigable water, they belong to such owners, subject to the paramount right of navigation and commerce. There is a marked distinction made by such legislation between the submerged lands of fresh navigable waters and those covered by the flux and reflux of the tide, and known as tide lands. In view of these considerations, and the tendency of our adjudications to recognize rights in the riparian owners on the Willamette river that do not belong to the public, and the custom which has prevailed from the early settlement of the country in respect to the building of wharves, it is at least reasonable to infer that the state has acquiesced in the right of the riparian owners to build wharves in aid of navigation. In fact the absence of legislation in respect to the state's proprietary interest in the shoal water of submerged lands of the Willamette river, taken in connection with the legislation providing for the sale and disposal of tide lands, and adjudications to the effect that the grant of its proprietary interest therein is free from any easement of the riparian owner, and subject only to the public right of navigation and commerce, leads to the conclusion that it is the policy of this state, as of other states, to allow riparian owners on such rivers to build wharves in aid of navigation.

Mr. Gould says: "Riparian owners upon navigable fresh-water rivers and lakes may construct in shoal water in front of their land wharves, piers, landings, and booms in aid of and not obstructing navigation. This is a riparian right, being dependent upon title to the bank, and not upon title to the river-bed. Its exercise may be regulated or prohibited by the state; but, so long as it is not prohibited, it is a private right derived from the passive or implied license by the public. As it does not depend upon title to the soil under water it is equally valid in the states in which the river beds are held to be public ¹⁶⁴ property, and in those in which they are held to belong to the riparian proprietors, *usque ad*

filum aquæ." Again, he says: "The legislature may authorize the extension of such structures beyond low-water mark; but, if not sanctioned by the legislature, they are illegal, so far as to interfere with or limit the right of navigation": Gould on Waters, sec. 176. In view of these considerations, the wharf of plaintiffs, being in aid of navigation, is a legal structure and private property, which can only be taken for public use according to established law, and with due compensation therefor.

8. Passing these considerations for the present, there is another phase of the case which seems to be decisive of the assent of the state to the building of plaintiffs' wharf. The legislative assembly, at its session held in 1862, passed the following act relating to wharves in cities:

"SEC. 4227. The owners of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporate town therein, are hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water.

"SEC. 4228. The corporate authorities of the town wherein such wharf or wharves is proposed to be constructed shall have power to regulate the exercise of the privilege or franchise herein granted; and, upon the application of the person entitled to and desiring to construct such wharf or wharves, such corporate authority shall, by ordinance or other like mode, prescribe the mode and extent to which the same may be exercised beyond the line of low-water mark, so that such wharf or wharves shall not be constructed ¹⁶⁵ any further into such stream or other water beyond such low-water line than may be necessary and convenient for the purpose expressed in section 4227, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water."

In 1869 the city of Portland, under the authority of this statute, passed an ordinance defining the wharf limits and regulating the building of the same. Section 3 of this ordinance provides that "all wharves and piles now erected or driven beyond the lines described in section 1 of this ordinance shall be removed to conform to the above-described

line within ten years from the date of the approval of this ordinance; *provided*, that if any such wharf or structure shall be at any time destroyed by the elements, or so damaged as to necessitate the rebuilding thereof, it shall be rebuilt to conform to said above-described lines."

The contention for the defendants is that the plaintiffs' wharf having been already built when the statute was passed did not come within its purview; that the statute provides for the doing of future acts under the regulation of the corporate authorities; that it does not legalize, or attempt to legalize, wharves theretofore constructed; that the words "proposed to be constructed," and "desiring to construct," and "hereby authorized to construct," show beyond cavil that future and not past erections were what the lawmakers had in mind. The rule undoubtedly is that a statute is to be construed to operate prospectively and not retrospectively, unless the language is so plain and direct as to preclude all question as to the intention of the legislature. The rule is founded on the principle that a construction should not be given to a statute that will take away or restrict rights, unless the intention of the legislature cannot be otherwise satisfied. A retrospective law is always subject to the limitation that it ¹⁶⁶ shall not be such as is termed *ex post facto*, or as impair the obligations of contracts. But we do not think there is any occasion to apply the principle suggested to the statute in question. There is no claim that it affects past transactions, or relates back and gives them validity. It is not pretended that the statute has a retroactive effect, and made wharves legal structures which were erected prior to its enactment. The statute neither commands certain acts or things to be done, nor prohibits them from being done. It is a permissive statute, which allows certain things to be done without commanding them. "Under the provision of the statute," said Boise, J., "any person within an incorporated town within this state may build and maintain a wharf from his land at high water into navigable water, so far as is necessary or convenient to accommodate shipping, if he conforms to the legal restrictions imposed on him by the authorities of the town, and does not impede navigation. Such structures are erected in all commercial towns, and have been recognized as legal structures in all the states": *Parker v. Taylor*, 7 Or. 446. The statute simply grants permission or license to any upland owner in an incorporated

town whose land fronts upon a navigable stream to construct a wharf in front of his land, which permission, when acted upon, renders his wharf a legal structure. Its object is to encourage the building of wharves to aid navigation, and for the benefit of commerce. Within its purport, then, what difference would it make whether the wharf was built before or after the statute was enacted. In either case the wharf would serve the object it sought to accomplish, and hence be a legal structure within its spirit and intent.

9. But it is argued that the leave granted under the statute being merely a permission or license it is revocable at the pleasure of the state; and that, as a consequence, ¹⁶⁷ the wharf of the plaintiffs ceases to be a legal structure, or to have a legal existence, when the leave is withdrawn or the license revoked. The statute has not been repealed either directly or by implication, and, so far as it is concerned, there is no revocation of the license granted. The most that has been claimed for the Meussdorffer act (Laws 1891) in that connection is that it, being for a public purpose, operates to revoke the license of the plaintiffs, and thereby to deprive their wharf of its legal foundation and existence. It will be observed, then, that the argument is based on the theory that the permission granted by the statute to build wharves is merely a license, and, as such, may be revoked at the pleasure of the state, after it has been acted upon, and the wharf erected. This is not so. As was said in *Bowlby v. Shively*, 22 Or. 410, the statute does not vest any right until exercised; it is a license revocable at the pleasure of the legislature until acted upon and availed of. It is doubtless true that if the statute should be repealed, or the adjacent tide lands disposed of, the privilege given the upland owner to build a wharf across the tide lands to deep water, unless acted upon or availed of, would be revoked. But the riparian owners who have taken advantage of the permission or privilege to build wharves—especially those on fresh navigable waters, for the reasons suggested—have acquired rights that would not be affected by the repeal of the statute. These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor. Hence, the contention of the defendants that the Meussdorffer act—which authorizes the location and construction of the Burnside street bridge, and under which

they are proceeding to build it—is a revocation of the leave or license, cannot be maintained.

¹⁶⁰ Nor do we find any thing in the case of the *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 436, in conflict with this result. There the grant of the submerged soil of the lake was in such quantity as, in the opinion of the court, impaired the public interest in its waters, and operated, if irrevocable, as an abdication by the state of its trust over the property. The right of a riparian owner to build a wharf over the submerged soil of a river to navigable water is not inconsistent with the public interest, nor in prejudice of the public rights. Nor does the grant of such subjacent soil or tide lands, subject to the paramount right of navigation and commerce, authorize its use for any purpose inconsistent with the public interest. The land in front of the riparian owner, when used for a wharf, and under proper regulation, is in aid of navigation, and for the benefit of commerce. Of course the state has the right to regulate the building of wharves, or to determine how far rights in submerged soil can be exercised consistently with the easement of navigation. Our state has made such regulations, and, as there is no claim that the wharf of the plaintiffs impedes navigation, or is not erected in conformity with its requirements, it must be regarded as a legal structure, and entitled to be protected as private property. Although the evidence shows that the original wharf was torn down and rebuilt in the year 1866, in conformity with the ordinance, we have not deemed it necessary to refer to that fact as strengthening the right of the plaintiffs in the premises. Within the principle, and for the reasons suggested, it is apparent that the cases of *Rundle v. Delaware etc. Co.*, 14 How. 80, *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101, *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9, 42 Am. Dec. 312, do not determine the questions involved in the case at bar. The right to build ¹⁶⁰ and maintain a wharf, being in aid of navigation and for the benefits of commerce, rests on a different footing and principle from a license to erect mills with dams which may impede or obstruct navigation, or canals diverting the waters of a navigable river. Without further reference it is sufficient to say that we think the plaintiffs have a right of property in their wharf of which they cannot be deprived, except in accordance with established law, and, if it should be necessary that

it should be taken or destroyed for the use of the bridge, that it cannot be done without due compensation therefor: *Monongahela Nav. Co. v. United States*, 148 U. S. 312.

This decree must be affirmed.

DEDICATION OF STREETS BY REFERENCE TO MAPS.—ESTOPPEL: See *Osage City v. Larkin*, 40 Kan. 206; 10 Am. St. Rep. 186, and note; *People v. Reed*, 81 Cal. 70; 15 Am. St. Rep. 22, and note; *Trustees of M. E. Church v. Mayor*, 33 N. J. L. 13; 97 Am. Dec. 696, and note; *Gardiner v. Tisdale*, 2 Wis. 253; 60 Am. Dec. 407. As to estoppel against the original proprietor, see *In re Opening of Brooklyn Street*, 118 Pa. St. 640; 4 Am. St. Rep. 618; *Weisbrod v. Chicago etc. Ry. Co.*, 18 Wis. 35; 86 Am. Dec. 743.

STREETS.—DEDICATION DEPENDS UPON ASSENT OF OWNER, INTENTION, AND ACCEPTANCE, but dedication may be implied from a series of acts: See *Mason v. City of Sioux Falls*, 2 S. Dak. 640; 39 Am. St. Rep. 802, and note; monographic note to *State v. Trask*, 27 Am. Dec. 562, 563; note to *People v. Reed*, 15 Am. St. Rep. 30-33, discussing the question as to whether certain land in controversy had been dedicated to public use as a street. Note to *Osage City v. Larkin*, 10 Am. St. Rep. 189.

STREETS.—DEDICATION, EVIDENCE OF, BY USER: *Mason v. City of Sioux Falls*, 2 S. Dak. 640; 39 Am. St. Rep. 802, and note; note to *State v. Trask*, 27 Am. Dec. 564; *Commonwealth v. Moorehead*, 118 Pa. St. 344; 4 Am. St. Rep. 599.

TIDE LANDS.—TITLE OF STATE TO: See *Commonwealth v. Manchester*, 152 Mass. 230; 23 Am. St. Rep. 820, and note; *Miller v. Mendenhall*, 43 Minn. 95; 19 Am. St. Rep. 219, and note.

RIGHTS OF SHORE OWNERS ON NAVIGABLE WATERS.—RIGHT TO TIDE FLATS: See monographic note to *Miller v. Mendenhall*, 19 Am. St. Rep. 226-235.

WHARVES, ETC.—RIGHT OF RIPARIAN OWNERS TO BUILD ON NAVIGABLE WATERS: See *Prior v. Swartz*, 62 Conn. 132; 36 Am. St. Rep. 333, and note; *City of Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123, and note. Riparian rights and wharf privileges are property which cannot be taken away without compensation: *Rumsey v. New York etc. Ry. Co.*, 133 N. Y. 79; 28 Am. St. Rep. 600; *City of Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123.

WHARF RIGHTS OF RIPARIAN OWNERS IN THE ABSENCE OF CONSTITUTIONAL OR STATUTORY REGULATIONS OR PROHIBITIONS: See *Shively v. Bowlby*, 152 U. S. 1, affirming *Bowlby v. Shively*, 22 Or. 410; *Prior v. Swartz*, 62 Conn. 132; 36 Am. St. Rep. 333; *Miller v. Mendenhall*, 43 Minn. 95; 19 Am. St. Rep. 219; *Parker v. West Coast Packing Co.*, 17 Or. 510. Such rights must be distinguished from riparian rights which have been settled by legislation: *Eisenbach v. Hatfield*, 2 Wash. 236.

STATE v. ADAMS.

[25 OREGON, 172.]

SEDUCTION—PROMISE OF MARRIAGE.—Seduction, accomplished under promise of marriage to be performed only on condition that pregnancy results from the intercourse, is not seduction within a statute punishing seduction "under promise of marriage." Within the meaning of such statute seduction must be accomplished by means of an absolute promise of marriage, or one which becomes absolute the moment the woman yields.

M. L. Pipes, J. W. Whalley, and R. S. Strahan, for the appellant.

G. E. Chamberlain, attorney general, and W. T. Hume, district attorney, for the respondent.

172 BEAN, J. The evidence shows that the prosecutrix, who is about twenty-seven years of age, came to Portland in January, 1891, from Council Bluffs, in Iowa, where some two years before she had been acquainted with defendant, and had kept company with him for a few months. In April or May after her arrival in Portland she again met the defendant on several occasions at the home of a mutual friend, where she was accustomed to visit, and was frequently accompanied by him on her return after these visits to the place where she was working as a domestic. On one of these occasions, in either April or May, 1891, the defendant solicited her to go with him to Portland Heights, to which she first objected, but finally consented, and, after arriving at the end of the car line, they walked around the heights, and what occurred, as told in her own language, is, that "he teased me and teased me, until he induced me to give up to him. He said if he hurt me in any way he would see me through and marry me. If he got me in a family way he would marry me. I told him my intention was not to marry at all. He promised if he hurt me, if he got me in any different way, he would see me through, or see that I was cared for and do what was right; promised just as much as to say, 'I will marry you.' Said he never would hurt me. He promised both before and after that if he hurt me in any way he would see me through, and see that I was taken care of, just as much as to say, 'I will marry you.' " The immoral relations thus established continued at frequent intervals until a few months before the trial, in July, 1893, and resulted in preg-

nancy, and the birth of a stillborn child on the 4th of May, 1893.

¹⁷⁴ The only evidence given on the trial of a promise of marriage, or of the seduction, was that of the prosecutrix, as above detailed, and which defendant contends is insufficient to prove the crime charged, because, as he contends, seduction accomplished under a promise of marriage to be performed only on condition that pregnancy results from the intercourse, is not within the statute. The statute (Hill's Code, sec. 1863) provides that "if any person, under promise of marriage, shall seduce and have illicit intercourse with any unmarried female of previous chaste character, such person, upon conviction, shall be punished, etc. A subsequent marriage of the parties is a defense to the violation of this section." It will be observed that mere illicit intercourse is not an offense under this statute, nor is seduction alone made a crime, but the seduction under a subsisting promise of marriage of an unmarried woman of previous chaste character. The gist of the offense is, that the seduction shall be accomplished under or by means of a promise of marriage which is unfulfilled. Without the promise there can be no crime under this statute, however reprehensible the conduct of the man may be. A promise of marriage, and her reliance upon it, must be the means of inducing the woman to surrender her virtue. She must be drawn aside from the path of virtue she is then pursuing, and induced to yield to the solicitations of her seducer, by means of and under the influence of a promise of marriage, upon the performance of which she in good faith had a right to rely. Nothing less will satisfy this statute. Its object is not to punish illicit intercourse, but to punish the seducer who by means of a promise of marriage destroys the chastity of an unmarried female of previous chaste character, and who thus draws her aside from the path of virtue and rectitude, and then fails and refuses to fulfill his promise. It is, however, not necessary that ¹⁷⁵ the promise should be technically valid to sustain a civil action for breach of promise; and, although it may be conditioned upon immediate intercourse, thus rendering it void in a civil proceeding because founded upon an immoral consideration, it is still held sufficient to sustain a criminal prosecution if the woman in good faith relied upon it and was thereby deceived: *Kenyon v. People*, 26 N. Y. 203;

84 Am. Dec. 177; *Boyce v. People*, 55 N. Y. 644; *Callahan v. State*, 63 Ind. 198; 30 Am. Rep. 211; *People v. De Fore*, 64 Mich. 693; 8 Am. St. Rep. 863. In such case the mutual promise of the woman is implied from her yielding to the solicitations of her seducer under his promise of marriage, and the promise becomes absolute. But when the seduction is accomplished by means of a promise of marriage, to be performed only upon the condition that the intercourse results in pregnancy, no promise of the woman can be implied from such yielding, and it seems to us the contract smacks too much of a corrupt and licentious bargain to fall within the statute. How can it be claimed that a pure-minded woman is led astray and her ruin accomplished under a promise of marriage which, with her assent, amounts to nothing more than a mutual agreement to engage in illicit relations so long as pregnancy does not result, and which neither party expects nor intends shall be fulfilled except upon the happening of an event which may never occur? Take the case of a woman who yields under a promise of marriage by a married man, to be performed on the death of his wife, could it be seriously contended that such a case could be within the statute? And yet it is difficult to conceive any difference in principle between the case suggested and the one at bar.

The statute is not intended as an act to punish a man who prevails upon a woman to gratify his lust by a promise ¹⁷⁶ of marriage of such a character. Its plain object is to protect the innocent and confiding from being betrayed, and surrendering to their destroyers all that is estimable in woman, under the belief, based upon what she supposes to be an honorable proposal of marriage, to be performed in any event, that to yield is but to anticipate the time when the act will be lawful. Its design is to protect the chaste woman from the assaults of a wicked and designing man, who makes use of the most potent of all seductive arts to win the love and confidence of a woman by professions of love and marriage, and not to protect one who is willing to gratify her own lustful desires, stipulating only that if her shame is likely to become exposed it shall be shielded by marriage. It recognizes that a woman, confiding in what she supposes to be an honorable promise of a future marriage, and relying upon it, is peculiarly defenseless against the solicitations and persuasions of him to whom she is betrothed, and has consequently provided for the punishment of him who, by

means of such a promise, is guilty of betraying that confidence to the utter ruin and disgrace of the female, and the scandal of society. It was passed in the interest of good morals, and not as a cover for licentiousness. The words "under promise of marriage, seduce," it seems to us, manifestly contemplate that the seduction must be accomplished by means of an absolute promise of marriage, or one which becomes absolute the moment the woman yields. Any other construction would defeat the purpose of the statute, and render it a cover for licentiousness. In this case the improper relations continued between the prosecutrix and defendant, apparently without objection on her part, for more than a year after she is alleged to have been seduced, and yet during all that time there was no subsisting promise of marriage. The defendant, under such circumstances, was guilty of no crime ¹⁷⁷ for which he could be punished under the statute, for the condition upon which his promise was to be performed had not happened, and there was consequently no broken promise for which he could be punished. The object of the statute is not to punish one who seduces a woman and then marries her, but to punish one who uses the promise as a means of inducing the woman to submit to his lustful desires, and, after his purpose is accomplished, abandons his victim to her disgrace and shame. If the prosecutrix was seduced at all it was at the time the first connection took place, but there was no promise of marriage then, for the contingency upon which it was to become absolute did not happen until long after, and consequently the promise did not precede the intercourse, which is essential to constitute the crime.

The only case cited, or which we have been able to find, on the question presented by this record, is *People v. Hustis*, 32 Hun, 58, in which two of the three judges of the second department of the supreme court of the state of New York, in a very brief opinion, held that seduction accomplished under a promise of marriage conditioned on pregnancy resulting thereafter is within a statute similar to ours. This decision seems to have been based upon the proposition that the question had already been decided by the court of appeals in *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177, and in *Boyce v. People*, 55 N. Y. 644, but neither of these cases goes to the extent of holding the doctrine for which they are cited, only holding that a promise of marriage on

condition of immediate intercourse is sufficient, because the law implies a mutual promise by the woman from her yielding, and, the condition thereby being fulfilled, the promise becomes absolute. But when the promise is conditional, depending on pregnancy, the condition may never happen, and consequently the defendant may never be under any ¹⁷⁸ obligation to marry the prosecutrix. He is not under a promise to marry at the time of the seduction, and may in fact never be. And hence it seems to us the cases referred to do not sustain the doctrine announced in *People v. Hustis*, 32 Hun, 58, and we are unwilling to regard that case as controlling authority.

This conclusion renders unnecessary an examination of any of the other questions raised on this appeal, and the judgment of the court below is therefore reversed, and the cause remanded for such further proceedings as are not inconsistent with this opinion.

Reversed.

SEDUCTION.—PROMISE OF MARRIAGE CONDITIONALLY GIVEN: See the extended note to *State v. Carron*, 87 Am. Dec. 408. Seduction under promise to marry is committed if the man has carnal intercourse to which the woman's assent was obtained by a promise of marriage, made by the man at the time and to which, without such promise, she would not have yielded: *Putnam v. State*, 29 Tex. App. 454; 25 Am. St. Rep. 738, and note, with the cases collected.

PATTERSON v. GALLAGHER.

[25 OREGON, 227.]

MECHANICS' LIENS—FIXTURES.—No mechanic's lien can attach to a building for mere fixtures placed therein at the request of a tenant in possession. Mechanics' liens can attach only for material or work which has become a permanent part of the building or structure.

ACTION to foreclose a mechanic's lien. Gallagher leased of Smith and Woodward a brick building for a saloon, and employed the plaintiffs to connect his bar with waterpipes in the building and with a sewer, and they sought by this action to enforce a mechanic's lien for their charges for doing this work. They recovered judgment, and Gallagher appealed.

J. Simon, C. A. Dolph, and R. Mallory, for the appellant.

V. K. Strode and C. N. Wait, for the respondents.

228 Per CURIAM. Several objections are made to the validity of the lien, but, as we are of the opinion that the labor performed and material furnished do not entitle the plaintiff to a lien on the building under the Mechanic's Lien Law, the other questions need not be considered. The statute confines the right to a lien to a person "performing labor upon or furnishing material to be used in the construction, alteration, or repair, either in whole or in part, of any building," etc: Hill's Code, sec. 3669. Labor upon or material used in the construction, alteration, or repair of a building is the test of the right to a lien under this statute. "In other words," says Finch, J., "the work and material, both in fact and intention, must have become a part and parcel of the building itself": *Ward v. Kilpatrick*, 85 N. Y. 413; 39 Am. Rep. 674. The right to a lien proceeds upon the theory that the work and material for which the lien is sought has increased the value of the building by becoming a part thereof; and where such labor is performed or material furnished at the request of a tenant, in order to charge the property of the landlord, it must appear, therefore, in addition to the other requisites of section 3672, that such labor and material entered into and became a part of the building, and not merely a fixture for the mere convenience of the **229** tenant: *McMahon v. Vickery*, 4 Mo. App. 225. Now, in this case, it is clear the labor performed and material used by the plaintiffs did not become a part or parcel of the building, but were solely for the use and convenience of the tenant in conducting his business, and removable by him whenever he might cease to be such. They were fixtures like the bar to which they were attached, and were not more permanently connected with the building. It follows that the judgment of the court below must be reversed and the complaint dismissed.

Reversed.

In *Honeyman v. Thomas*, 25 Or. 539, it was again decided that no mechanic's lien could attach to property for fixtures placed thereon at the request of a tenant. Hence, a derrick erected by a tenant in a quarry upon the leased premises is a mere trade fixture, and cannot be made the subject of a mechanic's lien. As supporting the proposition that such derrick is a fixture, removable at the pleasure of the tenant, the court cited the following authorities: *Henkle v. Dillon*, 15 Or. 610; *Leonard v. Stickney*, 121 Mass. 541; *Carpenter v. Walker*, 140 Mass. 416; *Wall v. Hinds*, 4 Gray. 270; *Oregon Ry. etc. Co. v. Mosier*, 14 Or. 519; 58 Am. Rep. 321; Ewell on Fixtures, 95, 102; Phillips on Mechanics' Liens, sec. 178; and criticised *Merritt v. Judd*,

14 Cal. 59, and *The Olympic Theater*, 2 Browne, 275, maintaining a contrary doctrine.

MECHANICS' LIENS—FIXTURES.—A mechanic's lien does not attach to fixtures to a leasehold erected by the lessee: *Church v. Griffith*, 9 Pa. St. 117; 49 Am. Dec. 548. The Mechanic's Lien Law of Tennessee creates a lien only in favor of those who do work on a house, or furnish materials for doing the same, and does not embrace machinery which was intended to be used in such house for manufacturing purposes: *East Tenn. etc. Mfg. Co. v. Bynum*, 8 Sneed, 268; 65 Am. Dec. 56, and note. Furnishing and fixing a lightning rod on a house is not within the statute giving a lien for labor and materials "in building, altering, repairing, or ornamenting" a house: *Drew v. Mason*, 81 Ill. 498; 25 Am. Rep. 288. The costs of a flume are properly included in a mechanic's lien, where such flume is used for the purpose of conveying water to a wheel within the mill building, and is necessary as a fixed contrivance for the operation of such mill: *Derrickson v. Edwards*, 29 N. J. L. 468; 80 Am. Dec. 220. A mechanic's lien for constructing a sidewalk in front of a lot is not enforceable against such lot under the Iowa code: *Coenen v. Staub*, 74 Iowa, 32; 7 Am. St. Rep. 470, and note. See, also, the extended notes to *Paulsen v. Manske*, 9 Am. St. Rep. 538, and *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 694.

BABBIDGE v. CITY OF ASTORIA.

[25 OREGON, 417.]

MUNICIPAL ORDINANCES—APPROVAL—VALIDITY.—Under a charter providing that all municipal ordinances shall be submitted to the mayor for his approval or veto before they shall become law, and that, in the absence or inability of the mayor, the president of the city council shall have the power to approve and sign ordinances passed during the mayor's absence, an ordinance approved and signed by such president during the time that the office of mayor is vacant, and without an incumbent, is null and void.

MUNICIPAL ORDINANCES—APPROVAL.—If the submission of municipal ordinances to the mayor of a city is made necessary by the express terms of the charter, before such ordinance can become law, the requirement of the charter is mandatory, and noncompliance is fatal to the ordinance.

SUIT for injunction to restrain the sale of city lots for the collection of street assessments. The ordinance under which the assessments were made was passed, and was signed, and approved by the president of the city council at a time when the office of mayor was vacant by the resignation of one Crosby, who had been duly elected and qualified. The plaintiff claimed that the ordinance was null and void because not approved and signed as required by the city charter. The provisions of such charter relating to the subject are sufficiently set out in the opinion. Judgment for the defendant, and the plaintiff appealed.

G. Noland, for the appellant.

F. J. Taylor, for the respondent.

420 LORD, C. J. It is manifest from the language of these provisions that it is a temporary absence or disability only which authorizes the president of the council to act in the place of the mayor, and perform his duties. He is not authorized to approve ordinances or perform the duties pertaining to the office of mayor when such office is vacant, and without an incumbent. It is "in the absence or inability of the mayor," or "in the absence of the mayor from the city," or "during any absence of the mayor from the city, or if he be unwell, or unable to attend," that the president of the council shall perform the duties of mayor, "approve and sign all ordinances," or "have the right and power to approve such ordinances as may be passed during such absence." Within the purview of the charter the office of mayor is an important branch of the city government, the duties of which can only be performed by an incumbent, or some one acting in his stead when he is absent or disabled. The charter contemplates that a mayor is *in esse*; and that the office shall not be without an incumbent in case of death or resignation, for it provides that it "must be filled" by the council. So that, when a vacancy occurred by the resignation of Crosby, it was the duty of the council to appoint a mayor. To compel the performance of this duty in the interests of the public, the intent of the charter is, that no business of importance shall be transacted until such duty is performed, and the vacant office provided with an incumbent. Hence, before the president of the council was authorized to act as mayor or perform his duties, there must have been a mayor *in esse* who was absent or disabled. He can only act in the place of a mayor who is **421** unable to act by reason of absence or inability. These are conditions which must exist before the president acquires the right to perform the duties of mayor. As the office of mayor was vacant when the president of the council approved the ordinances in question his approval did not carry them into effect.

While the signature or approval of the mayor is not always essential to the validity of an ordinance, when it is regularly passed, yet, if its submission to him for approval or veto is made necessary by the express terms of the charter, before the ordinance can become law, such requirement is man-

datory, and the failure to observe it is fatal to the ordinance: Dillon on Municipal Corporations, sec. 331; 17 Am. & Eng. Ency. of Law, 243. The charter provides that "no ordinance passed by the common council shall go into force or be of any effect until approved by the mayor, except as provided in sections 44, 45, and 46," etc. These sections provide:

"SEC. 44. Upon the passage of any ordinance the enrolled copy thereof, attested by the auditor and police judge, shall be submitted to the mayor by the auditor and police judge, and, if the mayor approve the same, he shall write upon it 'approved,' with the date thereof, and sign it with his name of office, and thereupon, unless otherwise provided therein, such ordinance shall become law, and be of force and effect."

"SEC. 45. If the mayor do not approve an ordinance so submitted, he must, within ten days from the receipt thereof, return the same to the auditor and police judge, with his reasons for not approving it, and, if the mayor do not so return it, such ordinance shall become law, as if he had approved it."

"SEC. 46. Upon the first meeting of the council after the return of an ordinance from the mayor, not approved, the auditor and police judge shall deliver the same to the council, with the message of the mayor, which must be read, and such ordinance shall then ⁴³² be put upon its passage again, and, if two-thirds of all members constituting the council, as then provided by law, vote in the affirmative it shall become a law without the approval of the mayor, and not otherwise."

It is plain from these provisions that no ordinance can become a law and go into effect unless an enrolled copy thereof, duly attested, shall be submitted to the mayor, and, after it is so submitted only by his express approval indorsed upon it, or, if he does not approve it, by his refusal to return it with his reasons therefor within the time specified, or, if he veto it, by a two-thirds vote of the council over such veto. An ordinance which has not been submitted to the mayor, although regularly passed, cannot become law. It must be submitted to the mayor for his action before it can go into effect. Where an act provided that every resolution of the common council of the city should be presented to the mayor for his approval or veto, it was held that a formal and literal presentation must be made or shown: *State v. Newark*, 25 N. J. L. 399. The object of these provisions of the charter is to submit the ordinance before it goes into effect to the calm and separate deliberation and responsibility of the mayor.

The ordinance must not only pass the council, but it must be subjected to the scrutiny of the mayor, who is clothed with power to approve or negative legislative action. This being so, when the ordinances in question were passed and submitted to Bergman, as president of the council, he was not authorized to approve them, as the office of mayor was without an incumbent, and, while such vacancy existed, the contingency of absence or disability could not exist upon which his right to act as mayor in the approval of ordinances depended, and hence that such ordinances did not become law or go into effect. As a consequence the proceedings founded upon said ordinances are a nullity, and the decree must therefore ⁴³² be reversed and the defendants enjoined from further proceedings in the premises.

Reversed.

MUNICIPAL CORPORATIONS—ORDINANCES—APPROVAL.—It is *prima facie* evidence of the authority of an acting mayor to approve an ordinance when it is shown that the mayor of the city has stated to the council that he will be absent from the city for several weeks, and the council, acting according to charter, has elected one of their members as acting mayor during the mayor's absence, and that the person so chosen has served as acting mayor from the time of his election down to the passage and approval of the ordinance: *Seattle v. Doran*, 5 Wash. 482.

WILLIAMS v. TOLEDO COAL COMPANY.

[25 OREGON, 426.]

MECHANICS' LIENS—MINES.—Under a statute giving a mechanic's lien to every person who shall do work or furnish materials for the working or development of any mine, or in searching for metals, the lien is given to every person who shall do work or furnish materials, either in mining or prospecting, and applies as well to claims in which minerals have not, as well as those in which minerals have, been found.

MECHANICS' LIENS—MINES—WAGON ROAD.—Under a statute giving a lien to all persons who shall do work or furnish materials upon any shaft, tunnel, incline, adit, drift, or other excavation, one who performs labor in building a wagon-road connecting with a mine, but not constituting an incline or excavation, is not entitled to such lien.

MECHANICS' LIENS—LUMPING CHARGE.—A claim for a mechanic's lien containing a lumping charge in which are mingled items for which a lien is given with items for which no lien is given is insufficient to support the lien. The defect cannot be cured by oral evidence by means of which the items subject to such lien may be separated from those not subject thereto.

MECHANICS' LIENS—LUMPING CHARGE.—A claim for mechanic's lien for building a wagon-road cannot be joined in a lumping charge with one for digging a ditch or running a tunnel.

ACTION to foreclose a mechanic's lien for labor performed and material furnished in constructing a wagon-road, digging a ditch, and running a tunnel in connection with a mine. Judgment for the defendant, and the plaintiff appealed.

J. R. Bryson and W. S. McFadden, for the appellant.

L. Flinn and C. E. Wolverton, for the respondent.

429 MOORE, J. This suit is brought under the act of 1891 (Laws 1891, p. 76), to enforce an alleged lien on the property of the Toledo Coal Company. Section 1 of said act provides "that every person who shall do work or furnish materials for the working or development of any mine, lode, mining claim, or deposit yielding metals or minerals of any kind, or for the working or development of any such mine, lode, or deposit in search of such metals or minerals; and to all persons who shall do work or furnish materials upon any shaft, tunnel, incline, adit, drift, or other excavation, designed or used for the purpose of draining or working any such mine, lode, or deposit, shall have a lien upon the same to secure to him the payment of the work or labor done or materials furnished by each respectively, which shall attach in every case to such mine, lode, and deposit, and though such shaft, tunnel, incline, adit, drift, or other excavation be not within the limits of such mine, lode, or deposit" (with some provisos not material here). It will be seen that said section gives the following liens: 1. To every person who shall do work or furnish materials for the working or development of any mine, etc.; 2. To every person who shall do work or furnish materials for the working or development of any such mine in searching for such materials or metals; and 3. To all persons who shall do work or furnish materials upon any shaft, tunnel, incline, adit, drift, or other excavation **430** designed or used for the purpose of draining or working any such mine, lode, or deposit.

1. If the term "any such mine," in the second clause, relates to and means any mine, lode, mining claim, or deposit yielding metals or minerals, then a lien could not be acquired unless the search had been rewarded by a discovery of metals or minerals. Can it be supposed that the legislative assembly intended that the miner who had, at the request of the owner, performed labor or furnished materials in developing a mining claim, or in searching for metals or minerals therein,

would be denied the benefit of a lien because his labor had not brought to light the hidden treasures of the earth? If that were the rule, then the miner who, in developing a claim, discovers indications of metals or minerals, could be discharged just before bringing to light the object of his search, and be deprived of any remedy against such claim for his labor or materials, while the employer, with a single blow of the pick or an additional blast, might reveal the wealth for which the laborer had toiled. Such a harsh rule could never have been intended, as its manifest effect would be to discourage the development of mines and the search for metals or minerals by men of moderate means. Under the law, as we understand it, the prospector or discoverer of lands supposed to contain metals or minerals is able to secure aid in prosecuting his search, as the miner is much more willing to give his services in developing mining property when encouraged by the assurance of reward for his labor which a lien on the property is likely to afford. Both parties would thus have a common interest in the development of the claim, and, though a lien would probably not amount to much unless a discovery were made, the miner, though he might be disappointed, would not be deceived thereby.

It is evident that the term "any such mine," in the ⁴³¹ last clause, refers to the mines mentioned in those preceding. That is: 1. To a mine that is being operated for the purpose of obtaining metals or minerals, or mining proper; 2. To labor or materials furnished in searching for metals or minerals in any designated tract that is supposed to contain them or prospecting. "Mining" and "prospecting" are generic terms, which include the whole mode of obtaining metals and minerals, and the lien is given to every person who shall do work or furnish materials either in mining or prospecting. A lien is also given to all persons who shall do work upon or furnish materials for any shaft, etc., used for the purpose of draining or working any mine in which metals or minerals have been discovered, and to all persons who shall do work or furnish materials for any shaft, etc., designed for the purpose of working or draining any mine or place in which metals or minerals are supposed to exist, and such labor has been performed or materials furnished in prospecting for them.

2. A lien for labor performed or for material furnished in the construction, repair, or improvement of property is a rem-

edy given by law, and unless the notice filed by the claimant shows *prima facie* upon its face a substantial compliance with all the essential statutory provisions, no lien is thereby created, however equitable the claim may be: Phillips on Liens, 3d ed., sec. 9; *Gordon v. Deal*, 23 Or. 153. The claimant must by his notice clearly bring his claim within the provisions of the statute, and show that the labor was performed upon, or the materials were furnished for the construction, repair, or improvement of that class of property which the statute has made liable for the payment thereof, in order to be entitled to its remedial advantages: *Barclay's Appeal*, 13 Pa. St. 495. Examining the notice in the light of the foregoing rules, it appears that a portion of the ~~422~~ labor was performed in building a wagon-road which is not alleged, either in the notice or complaint, to be an incline or excavation. No provision is made by the statute for constructing wagon-roads, however necessary they may be to the successful operation of a mine. When liens are given for certain specified work the rule of *expressio unius est exclusio alterius* applies (Phillips on Liens, 3d ed., sec. 156), and hence no lien could attach for this class of work.

3. An account containing a lumping charge, in which is mingled an item for which no lien is given, will not support a lien; and the defect cannot be cured by oral evidence, by means of which the items for which a lien is given may be separated from those for which a lien is not given: 2 Jones on Liens, sec. 1419. In *Dalles Lumber etc. Co. v. Wasco Woolen Mfg. Co.*, 3 Or. 527, it was held that a corporation incorporated for the purpose of manufacturing and selling lumber could not acquire a lien for labor, and that having joined in a lumping charge a claim for labor with that for material, no lien was thereby created. So in *Kezartee v. Marks*, 15 Or. 529, it was also held that a lumping charge for material furnished and used in the construction of a dwelling-house and fence did not create a lien upon the house, when that alone was sought to be charged by the lien. Following the rule established by these decisions, we hold that the claim for building the wagon-road cannot be joined in a lumping charge with one for digging a ditch or running a tunnel, and, the claimant having joined them in his notice, no lien attached to the premises by reason thereof. Many other objections are made to the sufficiency of the notice, which we do

not deem necessary to consider. It follows from the foregoing that the decree must be affirmed, and it is so ordered.

Affirmed.

'MECHANICS' LIENS—MINES—WHO ENTITLED TO.—A person hired to oversee a mine, and control and direct its working and development, did, in the performance of his duties, some manual labor. It was held that for the wages due him he was entitled to a lien: *Mining Co. v. Cullins*, 104 U. S. 176. In *Smallhouse v. Kentucky etc. Min. Co.*, 2 Mont. 443, it was held that the general agent or superintendent of a mine was not entitled to a mechanic's lien for services rendered by him.

PARSONS v. HARTMAN.

[25 OREGON, 547.]

EXEMPTIONS—INJUNCTION TO RESTRAIN SALE OF EXEMPT PROPERTY.—A judgment debtor has no right to enjoin the sale of his personal property under execution on the ground that it is exempt by law from sale under judicial process, unless the property possesses a special value to the judgment debtor alone, such as a keepsake or memento of any kind, the loss of which cannot be compensated in damages.

APPLICATION for an injunction to restrain the sale of exempt personal property under execution. The property claimed as exempt consisted of the necessary wearing apparel of the judgment debtor and his family, his household goods, furniture, utensils, books, library, tools, implements, and apparatus necessary to enable him to carry on his profession of an attorney at law, by which he earned his living. Judgment for the plaintiff, and the defendants appealed.

Bailey & Balleray, for the appellants.

W. Parsons, for the respondent.

548 MOORE, J. Counsel contend that the plaintiff has a plain, speedy, and adequate remedy at law, and that equity will not entertain jurisdiction to enjoin the sale upon execution of personal property that is exempt therefrom. There is a conflict of authority upon the right of a judgment debtor to enjoin the sale of his personal property under execution upon the ground that it is exempt by law from sale under judicial process. It has been held in Texas that a sale of personal property which is exempt from execution may be restrained at the suit of the judgment debtor: *Nichols v. Claiborne*, 39 Tex. 363; *Alexander v. Holt*, 59 Tex. 205; *Stein*

v. *Freiberg*, 64 Tex. 271; but Mr. Freeman, in his work on Executions, volume 2, section 439, second edition, in commenting upon the rule established in *Nichols v. Claiborne*, 39 Tex. 363, says: "No reason for the decision was given, and we doubt whether any sufficient ⁵⁴⁰ reason can be found. The remedy at law, where exempt personal property is seized, is in most, and perhaps in all, cases adequate for the protection of the interests of the claimant." The rule announced in Texas has been adopted in Nebraska (*Cunningham v. Conway*, 25 Neb. 615), where the court gives the following statement and reason for its decision: "The plaintiff alleges in his petition that he possesses neither lands, town lots, nor houses, subject to exemption as a homestead, and that he filed an inventory of all his property with the officer, who refused to call appraisers to appraise the same. If these statements are true the debtor might have compelled the officer to call appraisers, or have brought an action against him for the failure to perform his duty, yet he is not restricted to these remedies. The property being exempt, the debtor is entitled to the peaceable possession of the same, and the officer may be enjoined from wrongfully depriving him of his property, as the officer is proceeding illegally under a claim of right": *Johnson v. Hahn*, 4 Neb. 149; *Mohawk etc. R. R. Co. v. Artcher*, 6 Paige, 83; *Belknap v. Belknap*, 2 Johns. Ch. 463; 7 Am. Dec. 548. In *Johnson v. Hahn*, 4 Neb. 149, an injunction was granted to restrain the sale of real estate for delinquent taxes, which could only result in a conveyance creating a cloud upon title. In *Mohawk etc. R. R. Co. v. Artcher*, 6 Paige, 83, the defendant sought to dissolve an injunction which restrained him from opening a private way across plaintiff's real property. The court continued the injunction for the reason that the act complained of was not a mere trespass, but an attempt to exercise a continued right of passing across and through the complainant's premises, to the permanent injury of the property. The case of *Belknap v. Belknap*, 2 Johns. Ch. 463, 7 Am. Dec. 548, was a suit to enjoin the defendant from lowering the outlet of a pond which furnished water to operate plaintiff's mill. The court found that it was not a case ⁵⁵⁰ of an ordinary trespass impending, but one great and special, leading to lasting mischief and the destruction of the estate, and tending to promote a multiplicity of suits, and perpetually enjoined the threatened injury. It will thus be seen that each case cited in support

of the rule adopted in *Cunningham v. Conway*, 25 Neb. 615, related to injunctions granted to restrain the creation of clouds upon title or to prevent trespasses upon real property.

In *Baxter v. Baxter*, 77 N. C. 118, it was held that injunction was not the proper remedy of the judgment debtor to determine the title to exempt personal property seized under execution. "Upon principle," says Mr. High in his work on Injunctions, section 122, in discussing the right of the judgment debtor to enjoin the sale of exempt personal property under execution, "it is difficult to perceive any satisfactory reason for interfering by injunction in such cases, since adequate relief may usually be had by an action at law." Section 380, Hill's Code, provides that "the enforcement or protection of a private right, or the protection of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law." Sections 132 to 143 furnish such a remedy at law for the recovery of personal property, and section 214 authorizes a jury to award damages for an unlawful seizure of such property. The owner of a chattel having a complete remedy at law for its unlawful seizure or detention, equity will not entertain jurisdiction at his suit to recover possession of it, except where it has a certain, special, extraordinary, and unique value, impossible to be compensated for by damages: 1 Pomeroy's Equity Jurisprudence, sec. 177. And if it appeared from the complaint, in the case at bar, that any article of personal property levied upon by the defendants possessed a special value to the plaintiff alone, ⁵⁵¹ such as a keepsake or memento of any kind, the loss of which could not be compensated in damages, equity would interfere to prevent its sale. Where an unlawful and oppressive seizure of exempt property has been made upon execution the claimant, under ordinary circumstances, may safely risk his cause to the keen sense of justice inherent in mankind, and feel assured that a jury will by its verdict award him damages for the injury sustained. The plaintiff having, under the statute, a complete remedy at law for his injury, and nothing appearing in the record to entitle him to invoke the interposition of a court of equity, the decree of the court below is reversed, the demurrer sustained, and the complaint dismissed.

Reversed.

INJUNCTIONS TO RESTRAIN EXECUTION SALES.—Injunction will not issue to restrain the sale of exempt property, although the defendant was prevented by causes over which he had no control from giving the required notice of his claim of exemption: *Driggs' Bank v. Norwood*, 49 Ark. 136; 4 Am. St. Rep. 30, and note. See, also, the note to *Walker v. Hunt*, 98 Am. Dec. 781.

McBROOM v. THOMPSON.

[25 OREGON, 552.]

WATERS—PAROL LICENSE TO DIVERT—REVOCATION.—A parol license to dig a ditch and divert water for irrigation purposes cannot be revoked by the licensor or his grantee with notice after labor and money have been expended in pursuance thereof by the licensee.

WATERS—PAROL LICENSE TO DIVERT—INJUNCTION TO RESTRAIN DIVERSION—ESTOPPEL.—Riparian owners and their grantors who have acquiesced for a number of years in the diversion of water for irrigation purposes by a nonriparian owner who has continually aided the riparian owners in keeping the channel of the stream open, and has expended money in thus improving his land which would be valueless without irrigation, are estopped from maintaining a suit to enjoin a further diversion of water by such nonriparian owner.

APPLICATION for an injunction to restrain the diversion of the waters of the Little Walla Walla river. On October 10, 1887, R. B. Crego was the owner of a tract of land through which the Little Walla Walla river flowed. This land was situated about two miles below the junction of said river with the Tum-a-Lum river, and on the day above mentioned was conveyed by Crego to the plaintiff, McBroom. The defendant Thompson being the owner of land above McBroom's, on February 28, 1884, granted his codefendants the right to divert the water of said stream, and carry it across his premises by means of a ditch, for the purpose of irrigating their land. They obtained Crego's consent thereto, dug a ditch, and since 1884, and up to the time of the commencement of this suit, continued to divert the water of said stream and irrigate their land with the water thus appropriated. This land was valueless without irrigation, and they returned no part of the water diverted to the said original stream. McBroom, prior to his purchase of the land, saw the ditch in question, and knew of the diversion of the water from the stream running through the land purchased by him. Judgment for the plaintiff, and the defendants appealed.

Cox, Catton, Teal & Minor, for the appellants.

Leasure & Stillman, for the respondent.

⁵⁶⁵ MOORE, J. The defendants contend that the ditch was constructed under a parol license from R. B. Crego, plaintiff's grantor, and that after its construction the license became irrevocable. The defendant W. S. Powell testified that, after securing the deed from the defendant Thompson, the construction of the ditch was commenced with Crego's consent, but that Henry Nichols then owned the tract of land now owned by the plaintiff. In this the witness is ⁵⁶⁶ in error, as the record evidence conclusively shows that Crego had obtained his deed from Nichols more than eight months prior to the date of Thompson's deed; and, while Nichols may have objected to the diversion of the water, he then had no right to speak as a riparian proprietor of the premises now owned by the plaintiff. The ditch having been constructed under a parol license from Crego, the question is presented whether such license is revocable after labor and money have been expended in pursuance thereof. "An executed license," says Lord, J., in *Curtis v. La Grande etc. Water Co.*, 20 Or. 34, "is treated like a parol agreement in equity; it will not allow the statute to be used as a cover for fraud; it will not permit advantage to be taken of the form of the consent, although not within the statute of frauds, after large expenditures of money or labor have been invested in permanent improvements upon the land, in good faith, upon the reliance reposed in such consent. To allow one to revoke his consent when it was given or had the effect to influence the conduct of another, and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel." In *Coffman v. Robbins*, 8 Or. 278, it was held that a parol agreement to divide the waters of a stream that had been acted upon by the parties for several years, under which ditches had been dug and possession given, would be enforced in equity. So, too, in *Combs v. Slayton*, 19 Or. 99, it was held that where the riparian proprietor had not claimed the exclusive right to the water of a stream, but had permitted the defendant to dig a ditch and appropriate a part thereof, that such acts evince a tacit agreement that each should be entitled to appropriate a just proportion of the water for the purpose of irrigation, and that such ⁵⁶⁷ agreement should be carried into effect. While it is claimed that the better rule, in view of the statute of frauds, appears to be that, so far as the question of

further enjoyment is concerned, the licensor may revoke the parol license after an outlay under it (Bigelow on Estoppel, 666), the contrary doctrine has, by the foregoing decisions, been firmly established in this state. The reason for the estoppel in such cases rests upon the principle that the licensee, after the expenditure of money and labor on the faith of the parol license, cannot be placed *in statu quo* upon its revocation: 2 Herman on Estoppel, sec. 982. The defendants having expended their money and labor in digging the ditch upon the faith of Crego's parol license, it follows that he could not revoke it after such expenditure, and the plaintiff, having acquired the title to his premises with notice of the diversion, could obtain no greater interest therein than his grantor possessed, and hence he cannot now revoke the license: *Curtis v. La Grande etc. Water Co.*, 20 Or. 34.

The evidence shows that the defendants have each year since the ditch was constructed aided the riparian proprietors, including Crego and plaintiff, in removing obstructions from the Little Walla Walla river, and in building dams in the Tum-a-Lum, under a common understanding that in consideration of such aid the defendants were to have the right to divert sufficient water for the irrigation of their lands; that the plaintiff and his grantor have for eight years, with knowledge of the diversion and use of the water, seen and acquiesced in the defendant's improvement of their farms by means thereof, under a reasonable expectation that the diversion and use would be continued, and from these circumstances it is contended that the plaintiff is estopped from discontinuing the diversion and use of the water for irrigation. Such acquiescence, ⁵⁶⁸ if voluntary and continued for a considerable length of time, constitutes a *quasi* equitable estoppel that does not cut off the party's title nor legal remedy, but bars his right to equitable relief, and leaves him to his legal action alone: 2 Pomeroy's Equity Jurisprudence, sec. 817. The case of *Dalton v. Rentaria* (Ariz., Sept. 25, 1887), 15 Pac. Rep. 37, illustrates this doctrine. That was a suit to restrain the defendants from preventing the waters of the Santa Cruz river, in Arizona, from flowing in certain acequias from which plaintiffs' land was supplied with water for irrigation. The plaintiffs had contributed their proportion of labor and expense in maintaining all said acequias for irrigating purposes equally with the defendants. The defendants, in their answer, admitted that the greater part of plaintiffs' lands, which were

arid, and would raise no crops without irrigation, had been cultivated for sixteen years. The court in passing upon the question said: "These admissions on the record are significant, and evoke a serious reflection. If the greater part of the plaintiffs' land has been cultivated for the last sixteen years it was done with or without defendants' consent. If without their consent, have they not been guilty of laches, unreasonable delay, and inexcusable neglect in waiting sixteen years without taking any steps to restrain the wrongful acts of plaintiffs? If the defendants were fairly put upon their guard; if they had actual knowledge that plaintiffs were diverting waters that belonged to defendants by virtue of prior appropriation; if they stood by for sixteen years or more, and saw the plaintiffs build their houses, open out their lands, and put them in cultivation, expend their money in the improvement of these homes, pay their proportion of the expenses, and bear their proportion of the labor in building and repairing the acequias, and otherwise do and perform such acts as indicated that plaintiff believed they had equal rights with defendants to the waters of ⁵⁶⁹ Santa Cruz river—do not all these circumstances serve to imply that defendants waived or abandoned any exclusive prior right to said waters? At least was there not such unreasonable delay as that they are now precluded from complaining? Will parties be permitted to stand by for sixteen years or more and see new fields put in cultivation, irrigated, forsooth, with water to which they have an exclusive prior right, see large sums expended in erecting new homes, and witness new and important interests intervene, and then be heard to complain? *A fortiori*, defendants will not be heard to complain if these things were done with their consent. Indeed, our opinion is in this case that acquiescence, nonaction, on the part of the defendants for so long a time gave consent. They could not consent 'till title vested, and then dissent,' so that it is really immaterial whether the irrigation was done with or without defendants' consent, if they stood passively by: See *Smith v. Hamilton*, 20 Mich. 433; 4 Am. Rep. 398; *Parke v. Kilham*, 8 Cal. 78; 68 Am. Dec. 310; *Joyce v. Williams*, 26 Mich. 332."

In *Slocumb v. Chicago etc. Ry. Co.*, 57 Iowa, 675, the facts showed that a small creek touching a corner of plaintiff's land was crossed by defendant's railroad upon bridges at two places. The defendant filled the bed of the creek at the two

crossings, and turned the channel along the side of the railway, so that the bridges were dispensed with, and the creek did not touch plaintiff's premises. The plaintiff stood by and saw the work of diversion progressing, and it was not until after it was fully completed, at a cost of more than five thousand dollars, that any objection was made. It was there held, upon those facts, that the trial court did not err in refusing to grant a mandatory injunction for the restoration of the stream. In the case at bar there has been more than a mere voluntary acquiescence, or standing passively by, while the defendants were digging their ditch ⁵⁷⁰ and improving their lands. The plaintiff and his grantor, for eight years, without any objection whatever, aided the defendants in repairing the damages caused by the winter freshets, with knowledge of their appropriation, and of the common understanding that in consideration of such aid the defendants were to enjoy the right of diverting the water for the irrigation of their lands. The defendants, thus encouraged by the plaintiff's voluntary acquiescence and participation in a common purpose, laid out their money and expended their labor in making homes for their families, under an obvious expectation that no obstacle would afterward be interposed to prevent their enjoyment. The plaintiff's objection, in view of the unreasonable delay and of all the circumstances of the case, now comes too late, and under the maxim that "he who is silent when he ought to speak, shall not be heard to speak when he ought to keep silent," he can have no standing in a court of equity to enjoin a diversion and use of the waters of a stream that he and his grantor have tacitly encouraged. It appears from the evidence that the defendants have been diverting about two hundred and forty inches of water from the Little Walla Walla river, without pressure, and that this quantity is necessary for their use, and that fully as much flows in the channel of said stream through plaintiff's land, which, if diverted, would be sufficient for its irrigation. Plaintiff's cause of suit is not based upon a division of the water in proportion to the equitable rights of the parties, but to enjoin the defendants from preventing the water of the stream from flowing through his land in the natural channel, undiminished in quantity; and since it appears that there are other riparian proprietors on said stream who are interested in the diversion, but are not parties to this suit, no decree could settle their respective rights by

a division of the water, and hence it would be ⁵⁷¹ useless to remand the cause for that purpose. The decree will therefore be reversed and the complaint dismissed.

Reversed.

PAROL LICENSE—REVOCABILITY OF.—This question is thoroughly discussed in *Pitman v. Boyce*, 111 Mo. 387; 33 Am. St. Rep. 536, and note, and *Lawrence v. Springer*, 49 N. J. Eq. 389; 31 Am. St. Rep. 702, and extended note. The question discussed in the principal case as to the power to revoke parol licenses to divert water from the land of another will be found treated at page 718 of the note to the latter case.

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CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

FITZGERALD v. ELLIOTT.

[102 PENNSYLVANIA STATE, 112.]

LIENS—POSSESSION.—It is indispensable to the existence of a common-law lien that the claimant should have an independent and exclusive possession of the property.

LIENS—BAILMENT—POSSESSION—TRESPASS AGAINST SHERIFF.—A servant who cuts and skids logs for his employer on land in the possession of the latter is not a bailee, and has no such independent possession as to create a common-law lien upon the logs for his money and labor expended. He cannot maintain trespass against a sheriff to recover damages for the seizure and sale of the logs.

LIENS FOR LABOR—TRESPASS AGAINST SHERIFF.—One who has a statutory lien upon personal property for labor expended cannot maintain trespass against a sheriff to recover damages for levying upon and selling the property, but must look to the fund realized by the sale.

S. T. Neill, H. A. Hall, and A. W. Gregory, for the appellant.

A. P. Huey, for the appellee.

120 McCOLLUM, J. This is an appeal from the refusal of the court below to take **121** off a compulsory nonsuit in an action against a sheriff for levying upon and selling a quantity of logs on an execution against A. Maxwell, who was the owner of a sawmill, and engaged in the business of manufacturing lumber. It appears from the evidence in the case that Maxwell owned the timber which had been cut and peeled on the Dixon tract; that he employed the plaintiff to cut the timber into logs and put them in the millpond, and that the logs levied on and sold by the sheriff were cut and skidded by the plaintiff on said tract, where they were at the time of the

sale. The logs were the property of Maxwell, but the plaintiff claimed a lien upon them for his labor. It also appears from the evidence that the sheriff did not at any time remove the logs, that the only possession he had of them was such as was imputable to the levy, and that the purchaser at the sale removed them subsequently thereto. It should be stated in this connection that it appears by the sheriff's return that from the time of the levy to the time of the sale he left the property levied upon in charge of A. W. Foster. The learned trial judge thought that upon these uncontroverted facts the sheriff was not liable to the plaintiff in an action of trespass.

It seems to us that the first question presented for our consideration is whether the plaintiff had a common-law lien upon the logs. If we concede that he had such a lien, we are then to inquire whether there was such interference with or disturbance of the property bound by it as rendered the sheriff a trespasser in making the levy and sale.

It is indispensable to the existence of a common-law lien that the party who claims it should have an independent and exclusive possession of the property. Had the plaintiff such possession of the logs? They were not on his land. They were on the Dixon tract, but whether Maxwell purchased it with the timber, the evidence does not inform us, nor is it material. The possession of the timber was in the owner of it, and that possession was not changed or affected by the arrangement under which the logs were cut and skidded by the plaintiff. The latter was not a bailee of the timber or of the logs cut therefrom. He was employed to cut the timber into logs and put them in his employer's millpond. There was nothing in the nature of his employment which gave him an independent ¹²² and exclusive possession of the timber or the logs at any time, but, on the contrary the agreement under which he was to do the work was inconsistent with his claim of a right to the possession of them until he was paid for his labor. He cut and skidded the logs where his employer had the right to cut and skid them preparatory to their removal to his mill. If the plaintiff had a common-law lien upon the logs for his work, then he who cuts firewood or splits rails from his employer's timber, and hauls, or agrees to haul, the firewood to his employer's house, or the rails to designated points on his farm for the purpose of fencing it, has a like lien. And, if this be so, then

the person who is employed to dig coal in his employer's mine, and pile it at the pit's mouth on his employer's land, has a common-law lien upon the coal for his labor in digging and piling it. But in *Ritter v. Gates*, 1 Am. Law Reg. 119, decided at Pittsburg in 1852, it was held by this court, in an opinion by Chief Justice Black, that a laborer employed to dig ore has no lien upon it for his wages.

The cases cited in support of the plaintiff's claim are not analogous to the case at bar. They were cases in which the lienor had an independent possession of the property as a bailee, or in which the lien was created by the agreement of the parties. In this case there was no bailment or stipulation for a lien.

The fundamental error in the plaintiff's contention lies in his assumption that he had an independent possession of the property, when in fact such possession as he had was that of his employer. Maxwell was in possession of the Dixon tract for the work the plaintiff did for him there, whether he owned it or not; the land on which the timber lay and the logs were cut and skidded was in his possession for the purpose for which his employee used it. It follows that the rights of the plaintiff in respect to lien and possession were the same as if his employer owned the land on which the work was done. In cutting and skidding the logs where he did he was exercising his employer's right to cut and skid them there.

We conclude, upon a careful consideration of the plaintiff's testimony in reference to the agreement under which he did the work, that he was not entitled to a common-law lien upon the logs, and that, if he had a statutory lien or preference for all or ¹²³ part of his claim, it did not make the sheriff a trespasser in levying upon and selling them. If he had a statutory lien or preference he should have looked to the fund realized by the sale, and proceeded for the enforcement of it in accordance with the provisions of the statute which conferred it. It follows from these views that the learned court did not err in denying the motion to take off the nonsuit.

The specifications of error are overruled.

Judgment affirmed.

LIENS—POSSESSION.—A lien upon personalty at common law is founded on possession, actual or constructive, and the right to detain the property until some claim in which the lien originates is satisfied or discharged: *Miller v. Marston*, 35 Me. 153; 56 Am. Dec. 694, and note. A lien on chattels

separate from the possession is contrary to the principles of the common law: *Jenkins v. Eicheberger*, 4 Watts, 121; 28 Am. Dec. 691, and note; *Oakes v. Moore*, 24 Me. 214; 41 Am. Dec. 379, and note; *Donald v. Hewitt*, 33 Ala. 534; 73 Am. Dec. 431, and note; *McIntire v. Carver*, 2 Watts & S. 392; 37 Am. Dec. 519, and extended note. A vendor's lien is at an end when the goods are delivered: *Lewis v. Steiner*, 84 Tex. 364. When a party entitled to a lien voluntarily delivers the property to the owner, the lien is extinguished: *Ferriss v. Schreiner*, 43 Minn. 148.

WATERS v. WOLF.

[162 PENNSYLVANIA STATE, 168.]

MECHANICS' LIENS—CONTRACT STIPULATIONS AGAINST.—A subcontractor or materialman has no right of mechanic's lien when the principal contractor has stipulated with the owner in writing that no liens shall be filed against the property.

MECHANICS' LIENS—CONTRACT AGAINST—CONSTITUTIONAL LAW.—A statute declaring the principal contractor the agent of the owner in ordering work or materials, and requiring the written consent of the materialman or subcontractor to bind him by a stipulation in the contract between the principal contractor and the owner that no mechanics' liens shall be filed, is unconstitutional, as an attempt to create a debt and give a lien therefor against the express covenant in the contract, and as an attempt to frame a new contract, and substitute it for the one made by the parties.

MECHANICS' LIENS—CONTRACTS AGAINST—CONSTITUTIONAL LAW.—A contract between the principal contractor and the owner that no mechanics' liens shall be filed against the property, destroys the right of a subcontractor or materialman to file a lien, and in such case the right cannot be preserved by statute. The subcontractor or materialman can have no right against the owner not founded on the contract of the principal contractor, and such right cannot be created by statute, independent of the contract.

T. Patterson and W. A. Way, for the appellant.

F. P. Iams and C. C. Brock, for the appellees.

158 DEAN, J. The plaintiff filed a mechanic's lien as subcontractor for work done and materials furnished in the erection of a four-story brick hotel for Nicholas Wolf in McKeesport, Allegheny county. Wolf, the owner, made his contract for the work and materials in the construction of the building with Thomas White, a contractor and builder. The contracts with White were two, one dated June 15, 1891, and the other November 7th of the same year. Both contracts contained this stipulation: "The contractor agrees that no liens shall be filed against said works, or on account of the

said contractor, neither shall there be any legal or lawful claims against the contractor in any manner, from any source whatever, for work or materials furnished on said works."

During the progress of the work White made an agreement with Waters, the plaintiff, as subcontractor, for work and materials on the building. Waters made no agreement with White with reference to filing a lien, nor did he consent in writing to be bound by the stipulations of White's contract with the owner. He filed this lien for a balance of four hundred and thirteen dollars due him, on which *scire facia* issued, and Wolf, the owner, filed affidavits of defense, averring that, by his contract with the principal contractor, no lien could be enforced. Plaintiff then took a rule for judgment for want of a sufficient affidavit of defense, which rule, after argument, on May 3, 1893, the court discharged without filing opinion. From that decree plaintiff took this appeal, assigning for error the decree discharging the rule.

If the decisions of this court touching the rights of the owner, in a long line of cases preceding and following *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, of which that opinion is only a concise summary, be the law, this appeal cannot be sustained. But, it is argued, the rule laid down in that and like cases is swept away by the act of June 8, 1891, passed subsequently, with the intention of rendering that rule inoperative as to all cases arising after the passage of the act. And this result is conceded by the appellee, if effect be given that act according to its terms.

The act referred to contains two sections, as follows:

"1. No contract which shall hereafter be made for the erection of the whole, or any part, of a new building, with the owner of the lot upon which the same shall be erected, shall ¹⁵⁷ operate to interfere with or to defeat the right of a subcontractor, who shall do work or shall furnish materials under the agreement of the original contractor in aid of such erection, to file a mechanic's lien for the amount which shall be due for the value of such work or materials furnished, unless such subcontractor shall have consented in writing to be bound by the provisions of such contract with the owner, in regard to the filing of liens. Without such written consent of the subcontractor all contracts between the original contractor and the owner, which shall expressly or impliedly stipulate that no such lien shall be filed, shall be invalid as against the right of such subcontractor to file the same.

"2. All persons contracting with the owner of ground for the erection or construction of the whole or of any part of a new building thereon shall be deemed the agent of such owner in ordering work or materials in and about such erection or construction, and any subcontractor doing such work or furnishing such materials shall be entitled to file a mechanic's lien for the value thereof within six months from the time the said work was completed by said subcontractor, notwithstanding any stipulations to the contrary in the contract between the owner and the contractor, unless such stipulations shall have been consented to in writing by such subcontractor."

The constitutionality of this act is denied by the appellee, and, as a consequence, the decision in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, it is alleged, is not abrogated by it.

The first statute on this subject, that of 1803, gave a lien to mechanics and materialmen against the building for debts contracted by the owner. The intervention of a contractor or builder, who might subcontract with mechanics and materialmen, was not recognized by that act. Then came the act of March 17, 1806, which, like the act of 1803, applied only to the county of Philadelphia, but which, by the act of 1808, was extended to the boroughs of Lancaster, Pittsburg, and Erie, and by subsequent acts still further extended. This act provides that every dwelling-house or other building, thereafter constructed, should be subject to the payment of debts contracted for or by reason of any work or materials furnished in the erection or construction of any house or other building, before any other lien which originated subsequent to the commencement ¹⁸⁰³ of the work. And by the same act, the act of 1803, which applied only to Philadelphia, Southwark, and Northern Liberties, was repealed. In *Steinmetz v. Boudinot*, 3 Serg. & R. 541, the materials were furnished before the act of 1806, and it was decided that as the contract for furnishing material was not made with the owner of the legal title, but with one who had contracted to purchase on a ground rent, a lien could not be sustained under the act of 1803; but it was stated by Tilghman, C. J., who delivered the opinion, that the act of 1806 was passed to relieve against such hardship, by giving a lien to the mechanic or materialman, whether the work was done or material furnished on the credit of the owner or not. This last statement was out-

side of the question decided. Whether the legislature could confer such remedy on one no party to the contract was not before the court. But then, under the act of 1806, it was held, in *Savoy v. Jones*, 2 Rawle, 343, that the estate of the remainderman was subject to sale on a lien filed by a materialman, under a contract with the owner of the life estate, even though the sale was made after the death of the life tenant. In this case the opinion is by Gibson, C. J., who says:

“The object of the legislature was to enable the mechanic or materialman to follow his labor or material into the building, which is pledged for the price, without regard to the estate of the owner. Did the lien proceed from a contract with the owner, the argument drawn from the apparent injustice of permitting a tenant for life to affect the estate of a remainderman, who was not a party, would not be destitute of plausibility. But there is no real injustice in the matter, the owners of the several parts of the fee being proportionately benefited; and it is consequently just that the whole should bear the burden.”

The only question for decision was, whether the contract of the owner of the life estate, which was for the benefit of both estates, could create a lien or burden on both. It was decided that the lien bound the whole estate. There was here a contract of the owner of an estate in the land on which the building was erected, and, at the date of the contract, the owner, the life tenant, of this estate, was in the actual possession; the remainderman had no part in the contract, yet his estate was held bound. To the same effect are *Bickel v. James*, 7 Watts, 9; ¹⁵⁹ *Anshutz v. McClelland*, 5 Watts, 492; *Holdship v. Abercrombie*, 9 Watts, 52, and other cases. It is said by Kennedy, J., in *Holdship v. Abercrombie*, 9 Watts, 52, that, as the act of 1803 provided a lien for work and materials in the erection of a building only when contracted for by the owner thereof, and the act of 1806, which expressly repealed that of 1803, omitted the words “contracted by the owners thereof,” and enacted that every building thereafter constructed should be subject to liens for work and materials, it was the manifest intent of the legislature to give a lien for work and materials, whether upon contracts made with the owner or with the contractor for the erection of the building. But in no one of the many cases decided under the act of 1806 was the question ever raised as to whether the owner could pro-

tect himself from liability by a contract prohibiting liens. In the absence of an express contract against liens, with a statute before him giving a lien to those with whom his contractor contracted, the consent of the owner that a remedy given by law should be enforced under the contract to build was certainly to be implied.

Then came the act of 1836, which did what none of the previous ones had done, provided a complete mode of procedure for the enforcement of the lien, yet it did not define with much more certainty than the others the rights of the owner and the lien creditor. It declared that: "Every building within the several counties of this commonwealth . . . shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same. The lien of such debt shall extend to the ground covered by such building, and to so much other ground immediately adjacent thereto and belonging in like manner to the owner of such building as may be necessary for the ordinary and useful purposes of such building."

By the language of this act, as by that of 1806, to create a lien against the land of the owner, the debt must be founded on a contract for work or material for the building. The act recognizes that, by contract, debts for work and material will be created, and then provides a statutory lien therefor. The act of 1806 had enacted that the building should "be subject to the payment of debts contracted for or by reason of any work done in the erecting and constructing" of the same before ¹⁶⁰ any other lien which originated subsequent to the commencement of the building. The act of 1836 declares that the building "shall be subject to a lien for the payment of all debts contracted for work done or materials furnished." There is, in this particular, but slight difference in the two acts. *Savoy v. Jones*, 2 Rawle, 343, decided that, under the act of 1806, the estate of the remainderman was bound by the lien, as well as that of the tenant for life, who had made the contract. *Holdship v. Abercrombie*, 9 Watts, 52, that the contract of a tenant for years bound the land of the owner on which the building was erected. *Bickel v. James*, 7 Watts, 9, that the purchaser at a sheriff's sale, under a mechanic's lien of the equitable title of a vendee in possession, who had contracted to build, was entitled to the possession in an ejectment as against the holder of the legal title whose purchase

money was unpaid. In *Evans v. Montgomery*, 4 Watts & S. 218, it was said the court never had decided that the same interpretation should be put upon the act of 1836 as upon that of 1806; still, as this interpretation was fairly applicable to that of 1836, the act of the 28th of April, 1840, was passed to relieve against the palpable injustice worked by such construction. This act declares that a mechanic's lien "shall not be construed to extend to any other or greater estate in the ground on which any building may be erected than that of the person in possession at the time of commencing said building, and at whose instance the same is erected."

It is not worth while to criticise the form of expression in this act; the intent is beyond doubt, that is, to restrict the right and remedy to the estate of him who makes the contract. If the courts had given a construction to the former acts destructive of the rights of the owner the legislature, when the wrong became manifest, righted it by an explicit enactment. The first case under the act was *Bruner v. Sheik*, 9 Watts & S. 119. In this case a warehouse insured by Sheik in the Lancaster Insurance Company had been burned; the policy provided that the insurance company could, at their election, pay the value of the property, or rebuild it; they elected to rebuild, and made a contract with one Cooper for the entire structure. Bruner, on a contract with Cooper, furnished the lumber and other materials for the new structure and filed a lien against the building. ¹⁰¹ It was held, there could be no recovery, because his contract was with the agent of the insurance company, and that the owner had no connection with the contract out of which the debt arose. The opinion is by Gibson, C. J., who says: "The affair was a transaction of the insurance company, and not of the owner, who was a stranger to the matter, and not to be affected by it." The owner, in one sense, had a connection by contract with rebuilding, but it was a contract of indemnity against loss by fire, and under this contract he had discharged fully, by the payment of premiums, his obligation; all that remained of performance devolved on the other party to the contract; with this party alone had the claimant in the lien any connection by contract, although his debt was contracted for material to be furnished to a building erected on land of the owner with consent of the owner. We cite this case because it is the first under the act of 1840, and it decides that to sustain a lien against the building there must be a

building contract connection between the claimant in the lien and the owner. It was not enough to show a debt for material furnished to a building by contract with one not in possession, and the erection of the building with the knowledge of and by the consent of the owner.

The next legislation was the act of 16th of April, 1845, which declared that the act of 1836 should be construed to extend to and embrace claims for labor done and material furnished in the erection of any house or other building in pursuance of any contract or agreement, and no claim that had been filed, or which might be filed, should be affected by any contract, but the same should be held as valid as if there had been no contract. The claim was soon made that the letter of this act embraced every form of debt incurred with or without a contract connecting the owner with the debt, and that every one who had done a stroke of work upon a building was entitled to a lien. But in *Jobsen v. Boden*, 8 Pa. St. 463, a lien filed by a journeyman carpenter, it was decided that it was not intended to enlarge the scope of the act of 1836 further than to bring within its provision special contractors who had been declared not entitled to liens under that act; that, with this enlargement, the owner was subject to a double lien; one by the contractor ¹⁶² and one by the master workmen employed by the contractor; but his liability extended no farther.

The next decision of importance is that of *Harlan v. Rand*, 27 Pa. St. 511, which holds that no one has power to bind the building for work done or material furnished, except the owner or contractor under him. Harlan, the owner, contracted with Singerly to erect the building; Singerly contracted with Leeds to put in a heater; Leeds contracted with Rand to furnish the pipes, dampers, and other portions of the heater. Rand filed his lien against the building, with notice to Harlan, owner, and Leeds, contractor. The court says:

"The claims of workmen and materialmen do not become liens on a house from the mere fact that the work was done or material furnished for its erection, for they must be founded on a contract, express or implied, direct or indirect, with the owner of the building. . . . When the owner employs a housebuilder to erect a house for him the parties are directly connected by contract, and the lien must be founded on it. . . . The law implies that the contract or for the

whole work may get materials, and contract with special artisans required for the different parts of the work on the credit of the building. . . . It requires for claimants of liens to have regard, not merely to their own interest, but to that of the owner, in making their contracts with third persons, and to exercise the caution required of all other persons of seeing that the person contracting with them has the authority to bind another person's property for the work or materials which are wanted of them."

It is said, in the course of the decision, that, while the law implies that the principal contractor may contract for material and work, and bind the owner to subcontractors, yet this is not a conclusive implication, and *Bruner v. Sheik*, 9 Watts & S. 119, is cited as a case where, from the very nature of the contract, there was no such implication.

Harlan v. Rand, 27 Pa. St. 511, lays down three propositions, which have been adhered to since by this court, viz: 1. The debt which is the subject of the lien must be founded on a contract, express or implied, with the owner; 2. When the owner employs a contractor to erect for him a house, a debt founded on a contract of the contractor with a subcontractor or materialman is, by implication, authorized by the contract of the owner, and therefore ¹⁶³ is the subject of a lien; 3. It is incumbent on such subcontractor or materialman to ascertain whether one assuming to be the principal contractor has authority to bind by lien the property of the owner.

The principal contractor is not designated by the term "agent" in the opinion, but when his relations to the owner, the building, and subcontractor are spoken of, and the extent of his power defined, the term is as applicable to him as if he had been specially appointed on a salary by the owner to put up the building. To say the power conferred by the contract on the builder or contractor is not an agency, within the strict legal definition of the term, is not controlling; for want of a better designation it indicates with sufficient clearness the fact, that is, that the owner, with the law before him, has empowered another to contract debts for work and material, which may be made a lien on his property.

So, in *Singerly v. Doerr*, 62 Pa. St. 9, following *Harlan v. Rand*, 27 Pa. St. 511, it was decided that it is "the contract for the erection which communicates the owner's power to bind the building." And in *Duff v. Hoffman*, 63 Pa. St. 191,

it was held that, when the act of 1845 gave the principal contractor a lien, he became, under his contract, as fully the agent of the owner as the mere architect or builder, and debts, under contracts made by him for work and materials, could be entered as liens against the owner; but that one who furnished lumber to a lumber-dealer who had contracted with the owner was not a contractor within the law, that his contract to furnish lumber warranted no implication of authority to bind the house by a lien on a purchase from others. This was followed by *Brown v. Cowan*, 110 Pa. St. 588. Brown, the owner, purchased lumber for his house from Barnes, a dealer in lumber, and paid him for it; Barnes bought part of the lumber from Cowan & Steele, and they, claiming it was furnished on the credit of Brown's house, filed a lien. The court below instructed the jury that it was not important what the contract was between the owner and Barnes; that if Barnes held himself out to the plaintiffs as a contractor, and they were led by his representations to furnish the lumber on the credit of the house, they had a right to a lien. It was held by this court that a contractor can only bind the building by virtue of the peculiar statutory relation he bears to the owner under the ¹⁸⁴⁵ contract, and that "this instruction was palpably erroneous; that the owner of a building could thus be entrapped into the payment of a debt which he never contracted, and which was not contracted by any one having any legal authority to bind him or his estate, is so monstrous that the mere statement of the proposition is a sufficient argument to refute it. . . . It is the plain and obvious duty of one who deals with an alleged contractor to know the relation which he bears to the owner; failing in this, he furnishes labor and material at his peril."

Phillips on Mechanics' Liens, section 497, says: "As the lien is a proprietary interest, for the security of debt arising by implication of law out of the performance of contract, it can in general be created only by the owner, or by some person by him authorized."

Schroeder v. Galland, 134 Pa. St. 277, 19 Am. St. Rep. 691, has given rise to considerable discussion, as if it were a new departure from settled adjudications. It is nothing of the kind. It is but a restatement of the law which had been announced in language which admitted of no other meaning, in a line of cases commencing with *Bruner v. Sheik*, 9 Watts & S. 119, in 1845. The criticisms on the decision seem

to have been prompted more by the concise statement of a principle, in somewhat more significant language, than by any newness in it. It pointedly holds that the subcontractor and materialman can have no right against the owner not founded on the contract of the principal contractor. That if the principal contractor, by virtue of his contract with the owner, becomes his agent, the agency is special, and the powers of the agent are limited by his contract. If he contracts that no lien shall be filed none can be.

Whatever may be said as to the conclusion warranted from the rulings in *Savoy v. Jones*, 2 Rawle, 343, and the line of decisions which follow it, interpreting the act of 1806, nevertheless, confining those decisions to the facts in the cases before the court, even they, as already noticed, did not expressly hold that a debt could be created by statute against an owner, independent of any contract with him. The tenant for life in actual possession could charge the entire estate by his contract, and so could the tenant for years and the owner of an equitable estate, but the debt in each case was based on a contract with one having an estate or interest in the land. And the act of 1836, with its ¹⁸⁵ supplement of 1840, clearly negatives an intent to create a debt, not having its foundation in a contract with the owner; they only confer a lien for one contracted either directly or indirectly by his contract. Of the many illustrations cited as debts created by statute, but a single one is really to the point. Salvage, the award made and lien given, as against the property of the owner, is supported by no contract, express or implied; those who voluntarily save ships, cargo, and passengers from peril have a lien on the property saved only because general maritime law and statute so declare. The debt is created by no contract; from the very nature of the case there could be none. Therefore, in the interests of commerce and navigation, public policy dictates an equitable recompense or debt, and with the debt a lien for it to those who, in the absence of any semblance of contract, incur risk and hardship to save life and property. All other attempts to point out debts, the creation of statute alone, turn out not to be such on examination. Taxation rests on the implied obligation of the citizen to contribute his proportion of the expense of the government which protects his life, liberty, and property. Penalties for tortious acts, fines for crimes and misdemeanors, are punishments

imposed in the interests of society, that the offender and other evil-disposed persons may be deterred from committing like offenses. The lien of the innkeeper on the baggage of his guest, of the tradesman on the garment of his customer, of the factor or agent on the goods and money of his principal, of the lawyer on the fund which has been collected by his professional services, all have their foundation in contract, express or implied. The instance given in the argument, of the goods of a stranger in the possession of the tenant being subject to lien and distraint for rent due the landlord, is not an exception. The owner of the goods, having knowledge of the contract, express or implied, between the landlord and tenant, and of the right of distraint, in view of some advantage to himself accruing from a partial and temporary sharing of the tenant's possession, places his goods on the demised premises; voluntarily subjects them to the right of seizure by the landlord; his goods are on the premises by virtue of the tenant's possession, which he shares under the contract, made by the tenant, or they could not be there at all. There is, under our law, ¹⁰⁰ no such thing as a statutory debt, that is, the creation of a debt by law between persons, except that of salvage already noticed, and that has its origin in an imperative public policy. Given a debt by contract, express or implied, the statute or law gives by special favor a special remedy, and this is all it can give.

It helps but little in the decision of the present controversy to demonstrate that the legislation on this subject has been crude, and that the judgments of the courts are inconsistent, and not always in accord with theretofore well-settled rules fixing the respective rights of owners of estates in lands. The Mechanic's Lien Law was a wholly new subject of legislation; liens based on contracts concerning chattels, both at common law and by statute, had long been recognized, and the principles on which they were founded and rules for their enforcement were well settled; but a building, to be of any substantial value, must include the land upon which it is erected; to pledge the building with the land to one who, by his labor and material, had given it value, without, in many cases, infringing on the rights of the owner, was a question beset with difficulties which were not attendant upon chattel pledges or liens. The object of the legislature was to secure payment of their debts to a class

deemed specially deserving. Those engaged in certain other trades and occupations, tailors, shoemakers, factors, innkeepers, had liens for debts on chattels in possession; why should not the carpenter, bricklayer, mason, and materialman also have, as a pledge for payment, the thing they had made valuable? While the object was plain enough, the means of reaching it, without gross injustice to the landowner, whose rights had been settled by centuries of legislative enactment and judicial precedent, were far from plain. The courts have undertaken, since the beginning, to give effect to the purpose of the law as best they could. The existence of the debt to him who filed the lien, and that it had been created by contract with somebody in the erection of the building, in none of the adjudicated cases was questioned; and doubtless, in several of these earlier decisions, the rights of owners were lost sight of in the desire to give effect to the law and thereby satisfy the claimant's debt; and it may be conceded that, after this lapse of time, a close scrutiny of the judgments and reasons in vindication of them, in this particular, warrants unfavorable ¹⁸⁷ criticism. But it is not very hard, in looking back over more than half a century to the very beginning of a new departure in legislation, to point out defects in the first enactments, nor to find fault with the judicial interpretation of them. Courts try to give effect to the new law, while they try to avoid the confusion which comes from too rudely displacing the old, with a result, often of apparent, sometimes of real, contradictory decisions. But observation and experience in the untried field eventually lead to greater explicitness in enactment and reasonable certainty in administration. As has been said before, the pioneer who lays out the first path through the forest has difficulties to contend with not always considered by those who come after him; they, looking over the cleared ground, see swamps and elevations which could have been avoided, while he saw no other way than to cut through or climb over them; he had but little to guide him but the end to be reached, but they have the knowledge gained from his mistakes, which experience alone now demonstrates to have been mistakes. We do not desire to be understood as asserting that there are not lawyers capable of framing a perfect statute on a new subject of legislation, and wise enough to at once expound and enforce it by judgments that will stand the test of all time. But it is apparent from both legislative and judicial history that they

never consented to sit in either legislature or courts; that history shows nearly all our laws had their beginnings in crude enactments, followed often by mistaken exposition. Laws seem to be born full grown about as often as men are. So, whatever may be the logical deductions from some of the decisions which, prior to the act of 1840, held the entire estate bound by the lien, the weight of authority is, that, without violence to settled legal principles, a debt without a contract cannot be created against the owner. If it be conceded that, by mere legislative fiat, an indebtedness by one man to another may be established independent of contract, it necessarily follows that the legislature may prohibit the debtor from relieving his property by contract from the lien of such indebtedness. The act of 1891, in effect, establishes a debt when it prohibits an owner from contracting against encumbrances on his property, arising from indebtedness contracted by others. It declares that while all others shall pay once, he, ¹⁶⁸ for improvements, under certain circumstances, shall pay twice, although he seeks to protect himself against this injustice by express contract.

The owner's contract imposes payment of the subcontractor's debt on the contractor who expressly contracts it; the law, in the face of this contract, reimposes it upon the owner. This is more than a remedy for an existing right; it is an attempt to confer a right without a debt to support it: *Donahy v. Clapp*, 12 Cush. 440.

Whatever right appellant has must be implied from White's contract with Wolf; an exhibition of that contract shows an express covenant which extinguishes the otherwise implied right; the contract is between the owner who desires to build and the man who undertakes to perform the work. Why should not the owner freely contract in a purely business transaction so as to protect his property from unjust claims? There is no question of public policy involved, no exercise of the police power. Is it within legislative power to forbid such a contract? The legislature has all power not withheld from it by the people in their fundamental law. Article 1, section 1, of the constitution declares that: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness." Life, liberty, and property are put upon

the same plane, and an indefeasible right to the enjoyment of the first two, and to the acquirement and possession of the third, are placed beyond the power of any department of the government. What constitutes an indefeasible right to acquire and possess property? *Frorer v. People*, 141 Ill. 171, and Cooley on Constitutional Limitations, sections 391 and 393: "The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property, to the extent that he is thus denied the right to contract." English, J., in *State v. Peel Splint Coal Co.*, 36 W. Va. 802, quotes Sir George Jessel thus: "If there is one thing more than any other that public ¹⁰⁹ policy requires it is that men of full age and competent understanding shall have the utmost liberty to contract." *Commonwealth v. Perry*, 155 Mass. 117; 31 Am. St. Rep. 533: "The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law."

Hare's Constitutional Law, 357: "The term 'property' may be used to signify the thing owned or possessed, or the rights and privileges which together make up the aggregate of use or enjoyment implied in ownership. Property may therefore justly be defined as 'the dominion or indefinite right of user, or disposition which one may exercise over particular things or subjects.' This is its appropriate meaning, and that which it has in the constitution, although it is not infrequently used to indicate the thing, rather than the right, and much of the uncertainty and confusion, observable in the decisions, have arisen from overlooking this distinction."

Phillips on Mechanics' Liens, section 65: "A fundamental principle underlying the ownership of property is the right of possession and enjoyment, to be disturbed only by the voluntary act of the owner. The lien of a mechanic being a remedy, by which the property of one man may be taken for the benefit of another, it necessarily follows that it can only arise by the free consent of him to whom it belongs."

If, then, the indefeasible right to acquire and possess property necessarily includes the right to make reasonable contracts for its improvement, was the covenant to protect the owner an unreasonable one as to either contractor or sub-

contractor? "The contractor agrees that no liens shall be filed against said works, or on account of said contractor." We held, in *Brown v. Cowan*, 110 Pa. St. 588: "It is the plain and obvious duty of one who deals with an alleged contractor to know the relation he bears to the owner; failing in this, he furnishes labor and material at his peril." Although *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, has been modified so that now a more specific wording of the covenant against liens is required than appeared in that case, the law as declared there has been repeated in many cases since. It is said in that case, the subcontractor and materialman "are bound to do just what their principle was bound to do, because they assume to perform his contract with the owner to the extent of their undertaking, and of course they must perform according to his express limitations." It is said by ¹⁰⁷ Chief Justice Sterrett, in *McElroy v. Braden*, 152 Pa. St. 81, in speaking of the duty on part of those who expect to charge the owner and yet have no direct contract with him: "That duty can be properly discharged only by inquiring of the owner what the terms of the contract between him and the contractor are." In *Nice v. Walker*, 153 Pa. St. 125, 34 Am. St. Rep. 688, we held: "The only ground upon which the contractor can bind the building for either materials or labor is by virtue of the authority delegated to him by the owner, and where no such authority is delegated, but, on the contrary, is expressly withheld, and he covenants that no liens shall be filed against the building, he cannot file a lien himself, nor can his subcontractors do so."

It has therefore been settled by these decisions that such a covenant, exacted by the owner for the protection of his property, is reasonable, and will be enforced; that it binds both the principal contractor and those who contract under him; that it is the plain duty of those who deal with the contractor to ascertain the limit of his authority to bind the owner, if they expect to look to the owner for payment of their debts. If no unreasonable advantage be sought by the owner, and no unreasonable burden be imposed on the subcontractor or materialman, then the owner exercises only his indefeasible right of enjoyment of his own property when he so contracts, a right not in the power of the legislature to take from him.

In *John Spry Lumber Co. v. Sault Savings Bank etc. Co.*, 77 Mich. 199, 18 Am. St. Rep. 396, a statute not in substance different from ours was under consideration by the supreme

court of that state. In the opinion holding the statute unconstitutional the court says: "The law says, in so many words, such lien shall not be defeated by any contract, agreement, or understanding between the owner, part owner, or lessee of the real estate, and the original or any subcontractor. This statute is made for the express, and, so far as it differs from other statutes, for the only purpose of enabling strangers to the title to subject it to sale for obligations to which the owner never becomes bound, and in which he has no part whatever. It strikes at the foundation of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. . . . Such a gross perversion of all the essential rights of property is so plain, that no explanation could make it plainer."

¹⁷¹ This act, as in the one before the court in *Godcharles v. Wigeman*, 113 Pa. St. 437, undertakes to declare invalid private contracts between parties *sui juris*, which the court holds is beyond legislative power; the court says: "An attempt has been made by the legislature to do what in this country cannot be done; that is, prevent persons who are *sui juris* from making their own contracts."

Nor is the second section of the act any more effective for the manifest purpose than the first. The first section attempts to create a debt, and give a lien therefor, against the express covenant in the contract; the second section attempts to frame a new contract, and substitute it for the one made by the parties.

It is conceded in the argument that the covenant not to file a lien binds the principal contractor. Declaring him the agent of the owner in no way changes the situation of the subcontractor. His right still depends on the contract and is limited or wholly negatived by its terms. Unless the legislature can establish, between parties competent to contract, a new and different one, to which neither has assented, the right of all parties originating in the contract must be ascertained from the contract; an inspection of that shows that the owner has protected his property by an express covenant between him and the only one with whom he could contract. When this contract is made the owner knows no subcontractors, for there can be none until, by the assent of two minds, the legal relation of owner and principal contractor be estab-

lished; but, when that point is reached, the right of the owner is fixed by the covenant of the contractor. Then, and not until then, can there be a subcontractor, and his right can rise no higher than that fixed by the contract of his principal. The presumption is, the owner, in the exercise of common business prudence, ascertained the character of the contractor, and the contractor the financial ability of the owner; in this they have no advantage over the subcontractor; the contractor and those with whom he contracts have the same opportunities for intelligent bargaining. If, by the contract already made, no lien can be filed, the subcontractor knows, or can know it, and, if not satisfied of the personal responsibility of the contractor, can demand other security for his work or material. But neither the contractor ¹⁷² nor the legislature can change the contract, as made, without the consent of the owner, one of the parties to it. The subcontractor "cannot have the benefit of the builder's contract without accepting the conditions upon which those benefits are incurred": *Schroeder v. Galland*, 134 Pa. St. 286; 19 Am. St. Rep. 691. And the legislature cannot make a new contract for the owner. "The legislature makes laws, but laws are not contracts; their natures are essentially different": *Plank Road Co. v. Davidson*, 39 Pa. St. 440.

In *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 759, Black, C. J., in delivering the opinion of the court, says: "It is objected that these laws contract for the people of the city, and as the legislature cannot impair a contract, neither can they make one between parties who do not themselves assent to it. . . . I do not say, however, that a contract between two individuals, or between two corporations, can be made by the legislature. That would not be legislation. Besides, it would be impossible in the nature of things; for the essence of a contract is the agreement of the parties."

If there be such power in the legislature as is assumed in the second section of this act, then every business relation between any two persons may be declared that of principal and agent, with unlimited authority in the agent to contract debts which shall bind the property of the principal, in the face of positive agreement to the contrary. Such interference with the indefeasible rights of freedom of contract in the acquisition and protection of property the people have plainly reserved from legislative power.

That the legislature may give special remedies for the collection of certain debts has long been settled; that it may not take one man's property to pay the debt of another against the consent of the owner is just as well settled. Whatever reasonable regulations the legislature might make, as to notice to subcontractors and materialmen, of the terms of the contract between the owner and the only one with whom he bargains, the principal contractor, such as that it shall be in writing and shall be recorded, would be clearly within legislative power. But the second section goes far beyond regulation for the better securing of a remedy; it makes a new contract for the owner with persons wholly unknown to him, notwithstanding his express ¹⁷⁸ dissent, and which, in effect, subjects his property to the payment of a debt he owes not.

It is possible that scheme of government which contemplates a community of lands and goods will best promote the happiness of our race, but if so, the people of this commonwealth have said the contrary in their fundamental law.

The judgment of the court below is affirmed, and the appeal is dismissed at costs of appellant.

Mr. Justice Mitchell dissented, and said that "it was held in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, that the statutory lien being primarily for the benefit and security of the contractor might be waived by him, and if he waived it for himself he necessarily waived it for all who claimed through him. Subsequent cases have established the rule that the waiver to be effective must be clear and unequivocal: *Nice v. Walker*, 153 Pa. St. 123; 34 Am. St. Rep. 688; *Smith v. Levick*, 153 Pa. St. 522. The act of June 8, 1891, P. L. 225, changes the rule only so far that the right of the subcontractor shall not be waived except by himself in writing. That is the whole effect of the act. It gives no new right to any one, but simply provides that the right of lien under existing laws shall only be waived by the possessor of the right himself. I am unable to see that this is any thing more than the control over the form and effect of future contracts which has always been within the province of the legislature."

MECHANIC'S LIEN—EFFECT ON SUBCONTRACTOR OF WAIVER BY CONTRACTOR.—If a contractor covenants with an owner not to file a lien nor to permit one to be filed by others, neither he nor any subcontractor under him is entitled to a lien: *Nice v. Walker*, 153 Pa. St. 123; 34 Am. St. Rep. 688, and note; *Taylor v. Murphy*, 148 Pa. St. 337; 33 Am. St. Rep. 825, and note. See, also, *Creswell Iron Works v. O'Brien*, 156 Pa. St. 172; 36 Am. St. Rep. 30, and note; and the extended note to *Benedict v. Hood*, 19 Am. St. Rep. 699.

MECHANICS' LIENS—STATUTES AFFECTING.—The right to a mechanic's lien becomes vested at the time the material is furnished, and this right cannot be affected by statute: *Goodhub v. Hornung*, 127 Ind. 181.

LAUER v. KETNER.

[162 PENNSYLVANIA STATE, 265.]

JUDGMENTS.—SCIRE FACIAS TO REVIVE a judgment admits of no defense except one arising since its rendition.

JUDGMENTS—SCIRE FACIAS TO REVIVE.—COVERTURE AS DEFENSE cannot be pleaded or proved on a *scire facias* to revive a judgment, originally entered and revived without indication that the parties defendant were husband and wife, and subsequently revived against them as husband and wife. It is presumed that the coverture took place after the first revival, and that the last revival was regular and authorized.

E. D. Smith, for the appellant.

266 MITCHELL, J. On a *scire facias* to revive, no defense can be made except one that has arisen since the judgment. In the present case the original judgment was entered in 1873, and it was revived in 1878, without any indication up to that time that the parties defendant were husband and wife. When, therefore, it was again revived in 1883 against M. M. Ketner and Ann Ketner, his wife, the presumption was that the coverture had taken place since the previous revival, and that the judgment in that form was regular and authorized. There was nothing on the record to rebut that presumption, and coverture could not be pleaded or proved on a *scire facias* on that judgment.

These general principles are not questioned, as indeed they could not be in view of the settled line of authorities coming down as late as *Conlyn v. Parker*, 113 Pa. St. 29. But the learned judge below, relying mainly on *Seymour v. Hubert*, 92 Pa. St. 499, was of opinion that the fact of coverture having got upon the record by the revival of 1883, was available as a defense to the *scire facias* of 1888, and the case was to be treated as if on all fours with the decisions in *Dorrance v. Scott*, 3 Whart. 309, 31 Am. St. Rep. 509, and kindred cases. But *Seymour v. Hubert*, 92 Pa. St. 499, does not sustain the broad contention that, where the fact of coverture appears on the record, no matter how it got there, it will be a defense on *scire facias*. On the contrary, the decision is put expressly on the ground that the coverture was pleaded, and, instead of 267 demurring or moving to strike off the plea, plaintiff accepted the issue tendered and went to trial upon it, and thereby estopped himself from objecting to proof of the fact. All that that case decided was that if issue be tendered in a special plea, and accepted, the issue must be tried, even though the plea would

have been demurrable. The case is cited by our late brother Clark in *Cheraw etc. R. R. Co. v. Broadnax*, 109 Pa. St. 432, 442; 58 Am. Rep. 733, in support of this principle.

The fact that coverture appears on the record is not therefore by itself sufficient to make it a defense to a *scire facias*. The circumstances under which it gets there must also be considered. In the present case, as already said, the coverture only appeared on the second revival, and the presumption was that it had taken place since the first revival. The judgment of 1883 was regular on its face, and previous coverture could not be proved on a *scire facias* to revive it.

The order entering judgment against M. M. Ketner alone is reversed, and judgment is entered on the verdict against both the defendants.

SCIRE FACIAS—DEFENSES.—No answer to a *scire facias* will be sustained if it states matters which would have constituted a defense to the original action: *Shupp v. Hoffman*, 72 Md. 359; 20 Am. St. Rep. 476, and note; *Smith v. Eaton*, 36 Me. 298; 58 Am. Dec. 746, and note; *May v. State Bank*, 2 Robt. 56; 40 Am. Dec. 726; *Kincade v. Cunningham*, 118 Pa. St. 501. See, further, the extended note to *Frierson v. Harris*, 94 Am. Dec. 238.

SCIRE FACIAS—COVERTURE AS A DEFENSE.—Where a judgment was confessed by a man to a woman upon a bond the consideration for which was a contract to marry, and the parties married, and subsequently a *scire facias* was issued to revive the judgment, it was held that the coverture could not be set up as a defense to judgment on the *scire facias*: *Kincade v. Cunningham*, 118 Pa. St. 501.

PERLMAN v. SARTORIOUS.

[162 PENNSYLVANIA STATE, 320.]

SALES—PLACE OF.—If no place is designated by contract the place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser or to a common carrier, who, for the purpose of delivery, represents him.

SALES—PLACE OF—INSOLVENT PURCHASER.—A sale of goods situated in one state, by resident thereof to a resident of another state, while the seller is in the latter state, consummated by delivery to a common carrier in the former state, is a sale in that state, and governed by the law thereof.

A SALE ON CREDIT TO ONE WHO KNOWS HIMSELF TO BE INSOLVENT, and who has no reasonable expectation of paying for the goods purchased, is void by the laws of Maryland.

SALES—PLACE OF—SUBSEQUENT CHANGE IN TERMS OF.—The place of sale when goods in one state are sold by a resident thereof to a resident of another state is not changed by a subsequent modification of the terms of sale by letters written by the parties from their respective states.

I. Hiester and H. C. G. Reber, for the appellant.

C. H. Ruhl and D. Ermentrout, for the appellee.

323 GREEN, J. Referring to the testimony as to the original contract of sale made in October, 1892, it appears that Mr. Perlman was in Reading, Pennsylvania, at the vendee's place of business, and while there made the contract. Nothing was said as to any place of delivery of the tobacco, but the terms of the contract were that Frame was to pay "fifty cents a pound in bond," and was to pay the duty in cash. The tobacco was in Baltimore, Maryland, **323** which was the plaintiff's place of business, and was to be shipped, and actually was shipped, from that city. As we understand, the net price of the tobacco was fifty cents per pound, without any abatement for freights. This being the case, what was the place of delivery?

In 2 Benjamin on Sales, at section 1022, it is said: "As to the place where delivery is to be made when nothing is said about it in the bargain, it seems to be taken for granted almost universally that the goods are to be at the buyer's disposal at the place where they are when sold. . . . Kent says, volume 2, page 505, twelfth edition: 'If no place be designated by the contract the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay upon demand and is silent as to the place.'" In the footnote (10) to the foregoing text the writer says: "The place of delivery is that place where the goods are at the time of sale," and in support of this proposition a number of authorities are cited and commented upon.

Of course the ultimate destination of the tobacco was Reading, in this state, but a delivery to the carrier in Baltimore must be regarded as a delivery under the contract.

In *Schumacher v. Eby*, 24 Pa. St. 521, we said: "A delivery of goods to a carrier, in pursuance of a contract of sale or lien, is a delivery to the vendee or creditor so far as to pass the title intended."

In *Schmertz v. Dwyer*, 53 Pa. St. 335, a merchant in Bahia, Brazil, ordered goods from merchants in Pittsburg with in-

structions to send them "by first opportunity by vessel, either to this direct or via Pernambuco, or then to Rio Janeiro." The goods were shipped by the vendors from Pittsburg to New York, with instructions to ship them to Bahia. Held that the property passed to the vendee on their shipment from Pittsburg.

In *Garbracht v. Commonwealth*, 96 Pa. St. 449, 42 Am. Rep. 550, the present chief justice said: "The place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier who for the purposes of delivery ³²⁴ represents him. For example, a merchant in New York orders goods from a Boston house, and they are consigned thence to him either by a carrier of his own selection, or in the usual course of trade; the transaction is an executed Boston contract."

This rule was followed in *Commonwealth v. Fleming*, 130 Pa. St. 139, 17 Am. St. Rep. 763, in which we held that an order for liquor from a purchaser in Mercer county, to a dealer in Allegheny county to be shipped C. O. D., was a sale in Allegheny county, and was completed by a delivery to a common carrier in that county.

The case of *Rodman v. Thalheimer*, 75 Pa. St. 232, is cited by the appellants in opposition to the foregoing doctrine, but an examination of it does not show what the precise facts were in regard to the delivery, and the question does not seem to have been discussed by counsel. It was incidentally stated, in the *per curiam* opinion of this court, that the contract in that case was not to be executed in New York, and that may have been so, as we are not informed as to the delivery. But we cannot consider that there was any intention to overrule the numerous cases and the long-established law indicated in the authorities heretofore cited.

We therefore are of opinion that the learned court below was correct in holding that, as a delivery to the carrier in Baltimore was a delivery under the contract, and completed the sale so that the title passed while the tobacco was in Maryland, the law of that state controls the question now at issue.

There is no dispute that in this case none of the tobacco was delivered under the contract made in October, 1892. On January 7, 1893, Frame wrote to the plaintiffs saying it was not suitable for him to pay the duty in cash, and, unless they would sell on the same terms as in previous sales, he would

"have to let the lot go," and concluded, "so, if satisfactory to sell on four months as heretofore, please let me know, and I will advise when to make the next shipment."

To this proposition the plaintiff assented by letter from Baltimore, and after that the shipments were made. We are of opinion that the contract under which the shipments were made was the one which was established by the two letters, one of January 7, 1893, from Frame to plaintiffs, and the other from plaintiffs to Frame, dated Baltimore, January 10, 1893, with so much of the original contract as remained unchanged. The ²²⁵ duty was not to be paid in cash as under the agreement in October, and was to be included in the amount of the notes to be given at four months. This change was material, and makes a new contract, and this new contract was made by letter from a party in one state to a party in another state, accepted by the latter in a letter written from the place of his domicile. In such circumstances it cannot be said that the parties were both in Pennsylvania at the time the contract was made. As the goods sold were physically in the state of Maryland, and the sellers lived there, and furnished the goods there and completed the sale there by a delivery to a common carrier there, consigned to the purchaser in Reading, the contract was a Maryland contract, and must be governed by the law of that state so far as the question at issue here is concerned.

Proof was made on the trial as to what the law of Maryland is on the subject in controversy here, and we do not understand there is any dispute as to that matter. It was found by the jury upon the testimony and under the charge, and is therefore settled so far as the contention here is concerned. It is different from the law of Pennsylvania in that if the purchaser buys goods knowing his insolvency, and having no reasonable expectation of paying for the goods purchased, the purchase is void and does not pass the title. This feature would not be sufficient to avoid the sale in Pennsylvania unless there was also some trick, artifice, or deception used to accomplish the purchase.

The question whether Frame was insolvent, and knew that he was insolvent, and had no reasonable expectation of being able to pay for the goods at the time they were ordered, was of course a question for the jury, which was carefully and correctly submitted to them by the learned court below.

There was ample testimony in the case to support the plaintiffs' allegations in this respect, and it does not require any mention from us. We think the case was correctly tried, and we dismiss all the assignments of error.

Judgment affirmed.

SALES—PLACE OF.—A sale of personal property passes the title as between the vendor and vendee when such property has been designated and set apart by the former if such is the intent of the parties, though the vendor is not to make delivery of the goods until afterwards: *Commonwealth v. Hess*, 148 Pa. St. 98; 33 Am. St. Rep. 810. This question will be found thoroughly treated in the notes to *Wasserbock v. Boulier*, 30 Am. St. Rep. 348; *Commonwealth v. Fleming*, 17 Am. St. Rep. 772, 773, and the extended note to *Ford v. Buckeye etc. Ins. Co.*, 99 Am. Dec. 670.

SALES.—FRAUDULENT PURCHASERS: See *Gavin v. Armistead*, 57 Ark. 574; 35 Am. St. Rep. 262, and note; *Talcott v. Henderson*, 31 Ohio St. 162; 27 Am. Rep. 501, and extended note, and the extended note to *Thurston v. Blanchard*, 33 Am. Dec. 708.

SHARPE v. SCHEIBLE.

[162 PENNSYLVANIA STATE, 341.]

WATERS—SERVITUDE—OBSTRUCTION OF ARTIFICIAL WATERCOURSE.—If an owner of land digs a well-defined surface drain across it, and then sells and conveys the higher portion of the land to one party, and the lower part to another, the latter takes subject to a servitude to receive the surface water flowing in such drain, and is liable in damages to the former for obstructing such flow.

J. D. Ludwig and O. C. Bowers, for the appellant.

J. W. Sharpe, W. K. Sharpe, and William Alexander, for the appellee.

344 **FELL J.** This action was to recover damages caused by the obstruction of a surface drain by reason of which rain-water backed upon and overflowed the plaintiff's premises. W. H. Wanamaker owned a tract of some five acres of ground in what is now the borough of Chambersburg. The rainwater, which **345** fell on the higher ground in the vicinity and accumulated in the street upon which the lot fronted, flowed thence through an opening which was a well-defined surface watercourse, and spread over the land. In 1867 W. H. Wanamaker changed the opening from the street to a point a few feet distant, and constructed a ditch by which the water, which before had run upon and over his land, was conducted to a pond in the back part of his lot. His purpose in

making the change was twofold: to relieve the front of his lot from the flow of water so that he could improve it, and to collect the water in a pond at the rear where he could utilize it in manufacturing bricks. He erected a number of small dwelling-houses on the front, one of which he sold to the plaintiff in 1867; and in 1872 he sold the whole of the back part to the defendant.

When these sales were made the ditch was a well-defined surface watercourse two or three feet deep and as many wide, which conducted the rainwater, which otherwise would have run over the surface, to the pond mentioned. By a recent grading of the street the flow of water in the ditch has been somewhat increased, and the defendant, to avoid injury therefrom, placed obstructions in the ditch at the point where it enters his land, causing the overflow which injured the property of the plaintiff. The case has been argued here upon the right of the owner of a lower lot of land to shut off the surface water flowing from a higher one. It was submitted to the jury upon the trial as involving only the question of servitude imposed upon the defendant's land by the former owner of both properties.

We are of opinion that this submission included the only question in the case, and that the instruction to the jury on the subject was accurate and full. The grantor of both plaintiff and defendant, while he was the owner of the whole property, changed the natural channel to adapt the parts to the uses to which he intended to put them. This created an easement in favor of the land which he conveyed to the plaintiff, and imposed a servitude upon that which he afterwards conveyed to the defendant. Both parties bought with notice of this, and both are bound by it. The charge of the learned judge carefully guarded the defendant from a recovery for injuries caused by an increased flow of water resulting from a ²⁴⁶ change of grade of the streets by the borough authorities, and left him liable only for his own act in diverting the water which would have run upon his property before the change of grade.

The judgment is affirmed.

WATERS—SERVITUDES—DISCHARGE OF SURFACE WATER ON LANDS OF ANOTHER.—The owner of an estate, for the purpose of securing or protecting his reasonable use and enjoyment, may obstruct and divert surface waters thereon which have come from higher levels by embankments, ditches, drains, culverts, and other structures, and in so doing turn the same

back upon, or off, onto, or over the lands of other proprietors, without liability for injury ensuing from such obstruction or diversion: *Johnson v. Chicago etc. R. R. Co.*, 80 Wis. 641; 27 Am. St. Rep. 76, and note; *Brown v. Winona etc. Ry. Co.*, 53 Minn. 259; 39 Am. St. Rep. 603, and note; *Missouri Pac. Ry. Co. v. Renfro*, 52 Kan. 237; 39 Am. St. Rep. 314, and note; *Meixell v. Morgan*, 149 Pa. St. 415; 34 Am. St. Rep. 614, and note; but see *Ohio etc. Ry. Co. v. Thillman*, 143 Ill. 127; 36 Am. St. Rep. 366, and note.

GOOD v. ALTOONA CITY.

[162 PENNSYLVANIA STATE, 493.]

WATERS—POLLUTION OF—LIABILITY OF CITY.—If a city, by its system of sewer drainage, causes filthy and unwholesome sewage to flow into and pollute a natural running stream, whether of surface or subterranean flow, tributary to another stream, and to springs, to the use of which, in their pure and natural state, a riparian owner is entitled, and, by so doing, the fountain or source of water on and underneath his land is polluted and the water rendered unwholesome, dangerous to health, and unfit for domestic use, he is entitled to recover damages from the city.

A. S. Landis and E. H. Flick, for the appellant.

O. H. Hewit and M. A. Young, for the appellee.

497 FELL, J. Little need be said either in explanation or in vindication of the judgment in this case. The plaintiff is the owner of a farm situated three miles from Altoona, through which a stream, known as Mill Run, passes. The bed of the stream is limestone rock, through seams and fissures in which a part of the water finds a subterranean passage, and feeds two springs near the farm buildings, from which water is procured for the stock and for domestic purposes.

The city of Altoona constructed sewers, the contents of which flow into this stream, with the result to the plaintiff that the water of the stream and of the springs is so polluted as to be unfit for any use, and at times when the water overflows 498 the banks of the stream deposits of filth are left on his fields. By digging wells he has been unable to obtain pure water, as on account of the crevices in the rock the whole underground supply is polluted, and he is unable to obtain water for use on his farm except from a great distance and at great expense.

The assignments of error raise two questions: 1. Whether there is any liability on the part of the defendant; and 2.

Whether the recovery, if any can be had, shall be for a permanent injury. These questions were both properly submitted at the trial, and the jury found that the act of the defendant destroyed or seriously impaired a property right which the plaintiff possessed in a stream, and that there was no practicable method by which this injury could in the future be averted, and that it was continuing and permanent.

The fact that the stream has a partially subterranean course does not affect the right of the plaintiff, as the location of the part of the stream below the surface is well defined and easily ascertained.

Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 57 Am. Rep. 445, presented an entirely different question. It was there said: "It will be observed that the defendant has done nothing to change the character of the water or to diminish its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing onto the land artificially. The water as it flowed into Meadow brook is the water which the mine naturally discharges; its impurities arise from natural, and not artificial, causes." And the decisions in *Howell v. McCoy*, 3 Rawle, 256, *Barclay v. Commonwealth*, 25 Pa. St. 503, 64 Am. Dec. 715, and *McCallum v. Germantown Water Co.*, 54 Pa. St. 40, 93 Am. Dec. 656, holding that a stream of water may not be fouled by the introduction into it of any foreign substance to the injury of a lower riparian owner, were expressly recognized.

The judgment is affirmed.

MUNICIPAL CORPORATIONS—DEFECTIVE SEWER SYSTEM—LIABILITY FOR DAMAGES CAUSED BY.—A sewer controlled by a city, which is so negligently constructed or altered as to cause water and excrement to flow upon the property of a private owner, is a nuisance, for which the city is liable in damages after notice to abate it: *Chalkley v. City of Richmond*, 88 Va. 402; 29 Am. St. Rep. 730, and extended note. If the water of a city becomes polluted by the emptying into it of city sewers, so that a riparian proprietor can use it as he has been accustomed to do, he cannot recover against the city for the pollution so far as it is attributable to the plan of sewerage adopted by the city, but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence of the city in the care or management of them: *Merrifield v. City of Worcester*, 110 Mass. 216; 14 Am. Rep. 592. See, also, the extended notes to *Fort Worth v. Crawford*, 15 Am. St. Rep. 848, and *Ashley v. Port Huron*, 24 Am. Rep. 556.

GERZ v. DEMARRA.

(162 PENNSYLVANIA STATE, 530.)

SERVICES—WHEN GRATUITOUS.—Relationship, either by consanguinity or affinity, tends to rebut the presumption that a promise to pay is intended when personal services are rendered, but that fact alone does not overcome the presumption except as between parent and child. In all other cases there must be evidence beyond the relationship that the creation of no debt was intended.

SERVICES—AGREEMENT TO PAY FOR—RELATIONSHIP.—In an action by a son in law against the estate of his mother in law to recover for her board, evidence of declarations made by her to a third party that she had promised to pay for such board tends to show the existence of an agreement to pay therefor, and authorizes the submission of the question to the jury.

ASSUMPSIT for board and services. It appears from the specifications mentioned in the opinion that on the trial one Annie Haberbush, when called as a witness, testified that Mrs. Demarra, deceased, had often declared to her in her lifetime that she had promised Mr. and Mrs. Gerz to pay them for her board while living with them. The court instructed the jury that an admission by the decedent that she had agreed or promised to pay the plaintiff for board and services would create an obligation on her part capable of being enforced against her. Verdict and judgment for the plaintiff, and the defendant appealed.

J. E. Snyder and J. H. Brown, for the appellant.

B. F. Davis, for the appellee.

*** **PER CURIAM.** Suit was brought by J. W. Gerz against the executors of his mother in law, Theresa Demarra, for boarding, etc., while she was an inmate of his family from 1887 to 1889. The first trial resulted in a verdict and judgment for plaintiff; but on appeal to this court the judgment was reversed and a new trial awarded because of the erroneous rejection of testimony tending to prove payment, etc: *Gerz v. Weber*, 151 Pa. St. 396. Plaintiff in the mean time died, and his executrix was substituted on the record. None of the reasons that formerly moved us to reverse the judgment appear to exist now. None of the witnesses who were then produced to prove the allegations of fact recited in the rejected offers were called at the last trial. Instead of attempting to prove payment as before, defendants appear to have relied mainly on the alleged weakness of plaintiff's

case. It was clearly shown, however, that during the time Mrs. Demarra resided with her son in law she was well provided with every thing that was necessary to her comfort. There was also testimony tending to prove a mutual understanding ⁵²⁶ or agreement between them that she would pay for her boarding, etc. This testimony, referred to by the learned trial judge in portions of his charge recited in the second to the sixth specifications, inclusive, was submitted to the jury with instructions which appear to be free from substantial error. While said testimony is not as clear and positive as it might have been, it was quite sufficient, in connection with other evidence, to justify the court in submitting the question to the jury: *Miller's Appeal*, 100 Pa. St. 568; 45 Am. Rep. 394. The necessary implication from their verdict is that the existence of such agreement, as a fact, was found by them. That being so, there is nothing that requires reversal of the judgment. Clearly, there was no error in refusing to charge, as complained of in the first specification, that "under the law and the evidence in this case the verdict must be for defendants"; and we have already intimated that there is nothing in the remaining five specifications that requires any such action.

In view of the relationship of the parties to the transaction, we think the court held the plaintiff to a sufficiently rigid rule of proof. "Undoubtedly," said Mr. Justice Strong in a somewhat similar case, *Smith v. Milligan*, 43 Pa. St. 107, "relationship, either by consanguinity or affinity, is a fact which tends to rebut the presumption which the law raises, that a promise to pay is intended when personal services are rendered. But, alone, it does not overcome the presumption except in the case of parent and child. In all other cases there must be evidence beyond the relationship that the creation of no debt was intended." To the same effect is *Perkins v. Hasbrouck*, 155 Pa. St. 494.

Judgment affirmed.

SERVICES—IMPLIED PROMISE TO PAY FOR AMONG MEMBERS OF THE SAME FAMILY.—A promise to pay for services to each other voluntarily rendered by the members of a family living together as one household is not implied from the mere rendition and acceptance of such services, even though such parties are only remote kindred, or though not related by blood they stand in the relation of kindred to each other: *Disbrow v. Durand*, 54 N. J. L. 343; 33 Am. St. Rep. 678, and note; *Estate of Kessler*, 87 Wis. 660; 41 Am. St. Rep. 74, and note. See the extended note to *Williams v. Hutchinson*, 53 Am. Dec. 306.

COMMONWEALTH v. AMERICAN LIFE INSURANCE CO.

[162 PENNSYLVANIA STATE, 586.]

LIFE INSURANCE—INSOLVENCY—MEASURE OF DAMAGES.—A life insurance company, when adjudged insolvent and dissolved, has broken its engagement with its policy holders, and becomes liable to them in damages for such breach. The measure of damages is the net value of the policies, without regard to the health of the holder, calculated as of the date of the dissolution of the company, according to the tables of mortality used in the business of life insurance, less the outstanding premium notes, if any.

EQUITABLE ASSIGNMENT.—BILL OF EXCHANGE, OR DRAFT DRAWN GENERALLY, and not upon any particular fund, whether accepted or not by the drawee, does not operate as an equitable assignment, even when funds have been placed in the drawee's hands as a means of payment.

EQUITABLE ASSIGNMENT—SIGHT DRAFT—INSOLVENCY OF PAYER.—A sight draft, drawn generally on a life insurance company by its treasurer to the order of a beneficiary, indorsed by the latter and sent through a bank for collection, but returned unpaid after presentment and refusal to pay shortly before the insurance company is adjudged insolvent and dissolved, is not an equitable assignment of the fund, and gives the beneficiary no preference over the other creditors.

LIFE INSURANCE—INSOLVENCY OF COMPANY—MATURITY OF POLICIES AFTER DISSOLUTION.—The beneficiaries in life insurance policies maturing by the death of the insured after the company has been adjudged insolvent and dissolved are not entitled to a dividend on the face value of their policies, but only on the net value thereof calculated as of the date of the decree of dissolution.

LIFE INSURANCE—INSOLVENCY—DISTRIBUTION.—Auditors appointed to distribute the assets of a life insurance company after it has been adjudged insolvent and dissolved cannot separate mutual policies from ordinary policies in the distribution, if the company has never preserved a separate fund for the payment of mutual policies.

APPEAL from an order dismissing exceptions to the report of auditors distributing the funds of an insolvent life insurance company. The American Life Insurance Company was declared insolvent, and dissolved by a decree of the court of common pleas. A receiver was appointed, who found a balance of three hundred and fourteen thousand, eight hundred and thirty-four dollars and five cents for distribution to the beneficiaries of the insolvent company. Auditors were then appointed to make distribution of this fund, and to their report exceptions were taken and dismissed, and the report confirmed. On these exceptions the following opinion was delivered by the judge of the trial court:

588 SIMONTON, P. J. "The facts are sufficiently found in the auditor's report, and we shall not restate them except so far as may be necessary with respect to the special cases to

which the exceptions relate. In *People v. Security Life Ins. etc. Co.*, 78 N. Y. 114, 34 Am. Rep. 522, it is shown that, where a life insurance company has been adjudged insolvent and has been dissolved, it has broken its engagements with its policy holders, and becomes liable to them on account ~~589~~ of such breach, and the policy holders then have a claim for damages; and it is said that the decisions have uniformly been to this effect. The policy holders are in the same position as any other person would be who had running contracts of value with the company which it had broken—claimants for damages; citing several cases.

“As to the measure of the damages, there can be no question that, when a claim has become due before the date of the decree of dissolution, the amount of the damage for failure to pay is the amount of the valid claim, just as in all cases of failure to pay a just debt when due.

“But, where policies are running at the date of dissolution, the measure of the damage suffered in each case by the policy holder is, as is said in the same case, ‘the value of the policy which has been destroyed. When such value has been ascertained the true measure of damage has been arrived at, but the difficulty is to determine the value. In any given case the precise value cannot be ascertained. If the time of death were certain, and the rate of interest determined, there would be no difficulty; then the present value of the amount to be paid at death, diminished by the amount of the present value of all the premiums to be paid, would give the value. But the time of death is uncertain, and hence the present value of the running policy must always be speculative and uncertain.’ And, after discussing the mode of determining this value, the conclusion is arrived at that the net value of the policies, without regard to the health of the holder, and calculated as of the date of the dissolution of the corporation, according to the tables of mortality used in the business of life insurance, less the outstanding premium notes, if any, fixes the true value.

“The rules thus stated were adopted by the auditors in this case, and no exception has been taken to their action, except as to certain special cases, and it is therefore to these only that we shall direct our attention.

“In one of these special cases, in which exceptions to the report of the auditors have been filed, the claim was due at the date of the decree of dissolution, and the facts are as fol-

lows: Mary A. Miller was the beneficiary in a policy of five thousand dollars on the life of her husband, who died prior to the date of the decree of dissolution, and, due proof having been made of the loss, a ⁵⁰⁰ sight draft to her order was drawn on the company in her favor by its treasurer, and sent to her in Texas, where it was indorsed by her, and sent through a bank for collection, and was presented for payment, and payment refused, and shortly thereafter the decree of dissolution was entered.

"On these facts it is contended on her behalf that 'the draft of this company, drawn upon itself, was an equitable assignment of funds to meet the claim,' and that hence this is a preferred claim, and entitled to be paid in full. In *Nesmith v. Drum*, 8 Watts & S. 9, 42 Am. Dec. 260, it was held that a draft on a particular fund in the hands of a third party is an equitable assignment of the fund, although the draft be not accepted. And in *Clemson v. Davidson*, 5 Binn. 398, it is said by Tilghman, C. J: 'Any order, writing, or act which makes an appropriation of a fund amounts to an equitable assignment of that fund'; but, as is added in *Greenfield's Estate*, 24 Pa. St. 232, at page 240: 'The appropriation must be in express terms, or the intent to make it must be clear. An order drawn upon one who has in his hands funds belonging to the drawer will not of itself amount to the assignment of the fund, or any part of it, unless it plainly appears that the fund claimed was one designated out of which payment was to be made. If a debtor appropriates particular moneys to pay a certain debt, and it is as far delivered as the nature of the case will admit of, equity will control the appropriation, but if the act of appropriation is uncertain, or the subject matter doubtful, the right of property in the fund is unchanged.' And in 3 Pomeroy's Equity Jurisprudence, 1284, it is said: 'An ordinary bill of exchange, or draft drawn generally, and not upon any particular fund, whether accepted or not by the drawee, does not operate as an equitable assignment. Its operation is not changed even when funds have been placed in the drawee's hands as a means of payment.'

"These authorities sufficiently show that there was no equitable assignment of any particular funds in the case we are considering. It is not acceptance by the drawee, but appropriation of the fund by the drawer, which effects the assignment. By acceptance the drawee becomes the debtor to the

holder, but if the draft be drawn on a particular fund it constitutes an assignment, and binds the fund in the hands of the drawee on mere notice to him, whether he accepts the draft or not.

591 "Even if Mary A. Miller has become an equitable assignee by the delivery of the draft to her, she would not thereby have become a preferred creditor, but would have become an equitable owner of the fund assigned, and would have been entitled to follow it into the hands of the receiver if she could designate it and prove that it had come into his possession. But manifestly she can do neither. No fund is specified in the draft, and there are absolutely no *indicia* by which any fund can be designated or followed. There is, therefore, no basis on which her claim to be paid in full can rest.

"Exceptions have also been filed in respect of a special class of cases in which certain policies have matured by the death of the assured since the date of the decree of dissolution and before the filing of the auditors' report, and the beneficiaries in these policies contend that they are entitled to a dividend on the face value of their policies, and that the auditors erred in awarding them only a dividend on the net value calculated as of the date of the dissolution. The argument on their behalf concedes that the rule adopted by the auditors is correct when applied to policies still running at the date when the proofs were taken; but it is contended that this is at best a calculation of chances which is adopted from the necessity of the case, and that it should not be used where at the time it is applied the data for the ascertainment of the exact value of the policies were furnished by the death of the assured. There have been cases decided in New York and in England in which the rule contended for was adopted, among others, *People v. Security Life Ins. etc. Co.*, 78 N. Y. 130, and *Craig's case*, L. R. 9 Eq. 711. In the first case Earl, J. delivering the opinion of the court, said: 'This company was dissolved and a receiver appointed December 14, 1876; Thomas J. Lockwood, holding a life policy upon which the premium had been paid, died March 15, 1877. . . . The referee allowed the beneficiary only the reserve value of his policy at the date of the dissolution of the company, computed in the same way as the value of running policies were computed, disregarding entirely the fact of the subsequent death of the assured. In this he erred. The claimant was entitled to be allowed as

his damage the value of this policy. There is no statute regulating how such value as between the receiver and the claimant shall be determined. ⁵⁹² The rules by which the referee determines the value of running policies will not in all cases do justice. In some cases they may give the claimant more damage than he has sustained, and in other cases less. In their general application, however, they will work out results sufficiently accurate for judicial action. In general, they furnish the only practicable basis of computation, and hence are sanctioned. But these rules adopted from the necessity of the case should not be used where, upon facts existing, the precise value of the policy may be easily ascertained. Their use is not then justified by any necessity or considerations of convenience. Here the whole premium had been paid, and at the time the claim was presented the precise value of the policy at the time of the dissolution could easily be shown. It was free from uncertainty or speculation. . . . There can be no embarrassment in allowing the valuation of such policies to be computed in this way where the death occurs and the proofs of death are furnished at any time before the expiration of the time for presenting claims.'

"We think this course of reasoning overlooks an essential element in the problem, and places the question on a false basis. It is not a question between the receiver and the claimant. The receiver is no party to the litigation, and has no interest in it. He would not be heard on exceptions to the report of the auditors, or on appeal to the supreme court. It is a proceeding to marshal and distribute the assets of the insolvent corporation, and the parties to it are the several claimants, who are parties adverse whenever their interests clash, as they do if they belong to different classes. Hence, their relative equities are involved, and the rights of one class cannot be determined without considering those of all other classes.

"But it would be clearly inequitable, as between the several classes of claimants whose rights had not been fixed prior to the date of the decree of dissolution, to fix some of them at that date, and allow others the benefit of contingencies that might happen within an indefinite time thereafter. They could not change the equilibrium of their equities as against each other by any thing they could do themselves, and it ought not to be changed by lapse of time or the course of events. The question is not what claim any one has or would

have by the lapse of time and the event of death, but what claim had each as ⁵⁹² against the others when the corporation disappeared from the scene, and they were turned over to a fund insufficient to pay them all in full. And this suggests an answer to the argument of counsel in favor of these claims, who says:

“ ‘Suppose a dissolution and distribution of assets should occur in the case of a company, which upon liquidation of its estate should turn out entirely solvent. It could not be contended that the defunct company could escape from its legal obligations at the date of probate of claims by paying less than the full amount of a policy to a holder whose claim had matured by reason of the death of the assured since the decree of dissolution was entered. . . . Now, whether the dissolved company be solvent or insolvent, the equities of the policy holders are the same. . . . Each policy holder entered into his individual contract with the insurance company without regard to the terms of the contract of any other policy holder. Each should be entitled to come before the auditors for the amount due on his contract at the time fixed by law to take the proof of his claim.’

“If the corporation was solvent there would be no balancing of equities between the several classes of claimants, and the question would simply be what sum each, without any reference to the others, had a right to receive from the corporation, and justice would be done by sequestrating all its assets needed to pay all the claims in full; but we cannot agree to the proposition of counsel that ‘whether the dissolved corporation be solvent or insolvent, the equities of the policy holders are the same,’ if by this is meant their equities as between each other; for if the corporation be solvent they have no equities as against each other, and no one of them could meddle with the dealings between the corporation and any other; while, if the corporation be insolvent, each is directly interested in what is paid to the other, as is manifested by the fact that they are litigating their conflicting claims in this proceeding.

“We think, therefore, that when it is conceded that the rule adopted by the auditors is to be applied to the claims of those whose policies were running when the audit was held, as of the date of the decree of dissolution, the equities between the claimants require the same rule to govern in cases where

~~594~~ the assured have died since the dissolution, but before the audit was closed.

“It must not be overlooked that the breach of contract by the corporation, on which the claim for damages in all these cases is founded, occurred at the date of the decree of dissolution, and the damages to be recovered are the value of the claims at that date. But at that date the value of the claims now in question was not the value on which a dividend is now claimed, but merely the net value of a running policy, calculated with reference to the expectation of life. If the corporation at that date had paid the claims according to that value, the legal damage for the breach of contract would have been paid. On the other hand, if the net value of the policies still running had been calculated as of the date when the audit was held as damages on each, it would in each case have been different from the amount arrived at by calculating it as of the date of the dissolution. This brings into view the inequality, and, therefore, want of equity, which would result from calculating the damages as of different dates, even if the calculations were, in other respects, made in the same manner; and the inequality would be still greater where not only the date was different, but where the expectation of life, according to the tables, was taken in some cases, and a fixed date, ascertained by the prior accident of death, was adopted in others.

“Counsel for the claim of Josephine McCouch, the beneficiary in a paid-up policy on the life of William McCouch, who died nearly two years after the date of the decree of dissolution, seems to have recognized the force of one of these suggestions, as he claims not that the dividend should be based on the face value of the policy when the death happened, but on the net value at the date of the decree, calculated by ascertaining the present value of an amount equal to the face of the policy payable twenty-three months hence.

“This is a slight modification of the rule claimed to be applicable to the cases above considered, but it is open to the same objection that it does not adopt the value of the policy as it was at the date of the dissolution, which the auditors have found was nine thousand two hundred and seventy-three dollars and forty-four cents, but as it afterward was ascertained by the death of the assured to be thirteen thousand two hundred and seventy-five dollars.

"The claim in all these cases, as is shown in the case first ⁵⁹⁵ above quoted, is in the nature of damages for a breach of contract, and this breach occurs at the date of the decree of dissolution. The right of action for the damages suffered accrues at that date, and the damages in each case are the net value of each policy at that time. But if the damages are calculated by using data afterwards furnished by the death of the assured in particular cases, the amount, as is shown above, is different from that suffered at the date when the breach of contract occurred, and a value is fixed, as of that date, upon the policy, different from its actual value at that date. This being so, we think it would be inequitable to allow the amount to be fixed in that way, and that equity requires the same rule to be applied to all policies which were running at the date of dissolution, without regard to the fact that some have since matured by the death of the assured; and we do not base our conclusion on the act of 1873 (Purdon's Digest, 904, section 6), but on the general principles of equity.

"Much was said in the arguments of counsel for and against the authority of *Dean's Appeal*, 98 Pa. St. 101, as affected by the difference in principle between life and fire insurance. There is a radical difference, as is pointed out by Park, B., in *Dalby v. India etc. Life Ins. Co.*, 15 Com. B. 365. A life policy is a contract to pay a certain sum at an indefinite time; a fire policy is a contract to indemnify in case of loss. But this does not affect the authority of *Dean's Appeal* on the only point pertinent to this case, which is that the *status* of creditors of an insolvent corporation is fixed as of the date of the decree of dissolution.

"We have not been furnished with any data from which we can determine that the auditors erred in calculating the amount to be awarded on the so-called mutual policies by the same rule as that applied to the other policies. On this subject the auditors say and find: 'Counsel for death claims on mutual policies contend that the auditors should separate the so-called mutual policy holders from the other policy holders, determine what proportion of one fund for distribution is the result of mutual premiums, and to that proportion of the entire fund apply the rule the courts have laid down with respect to purely mutual companies. This is asking the auditors to do what the company itself never

did. . . . The company never kept a ⁵⁹⁶ separate fund for the payment of mutual policies, but all death claims were paid indiscriminately out of whatever funds it had in bank. It would be impossible for the auditors to do what the company never, in the many years of its existence, attempted.'

"Assuming the facts just stated to be true, as we must, in the absence of any evidence to the contrary, we cannot say that the auditors erred in their conclusion.

"It is contended that the auditors erred in failing to allow interest on the claim of Elizabeth Reich between July 18, 1889, when the policy on which the claim is based matured, and May 18, 1890, the date of the decree of dissolution. We can see no reason why interest should not have been calculated upon this claim between these dates, unless it be that interest was not allowed on any matured claims. Whether this be so or not, we are unable, from the data before us, to determine. If it should appear hereafter that this claim is equitably entitled to interest, it can be allowed on the second distribution, and we overrule this exception without prejudice to the right of the claimant hereafter to recover interest, if entitled thereto."

J. N. Dohan, H. G. McCouch, H. K. Fox, and D. Wallerstein, for the appellants.

W. C. Hannis, for the appellees.

⁵⁹⁹ Per CURIAM. We find no error in the decree. All that is necessary to be said in relation to the question, involved will be found in the clear and convincing opinion of the learned president of the court below. On it the decree is affirmed and appeal dismissed, with costs to be paid by the appellant.

EQUITABLE ASSIGNMENT—BILLS OF EXCHANGE AS.—An ordinary negotiable bill of exchange unaccepted in writing, and not drawn against any particular fund, does not operate in the hands of a payee as an equitable assignment of a debt due by account from the drawee to the drawer, nor can it so operate in the hands of the payee as collateral security for the payment of his debt so as to give him preference over another creditor of the drawer: *Baer v. English*, 84 Ga. 403; 20 Am. St. Rep. 372. A bill of exchange drawn on a debtor does not of itself operate as an assignment in equity of the debt, even if negotiated for a good consideration: *Bank v. Bogy*, 44 Mo. 13; 100 Am. Dec. 247, and note. A bill of exchange is not an equitable assignment of a fund upon which it is drawn, though negotiated, if, upon presentment, it was refused acceptance: *Ford v. Angelotti*,

37 Mo. 50; 88 Am. Dec. 174, and note. A bill of exchange cannot before acceptance operate as an equitable assignment of the fund in the hands of the drawee: *Kimball v. Donald*, 20 Mo. 577; 64 Am. Dec. 209, and note. The assignment of a fund in the drawer's hands is effected by a sight draft for the whole thereof, of which the drawee has notice while the funds remain in his hands, whether he accepts the draft or not: *Nimocks v. Woody*, 97 N. C. 1; 2 Am. St. Rep. 268, and note.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

**TRUSTEES OF WADSWORTHVILLE POOR SCHOOL v.
JENNINGS.**

[40 SOUTH CAROLINA, 103.]

LANDLORD AND TENANT—TITLE BY PRESCRIPTION.—Whenever the relation of landlord and tenant is terminated by any hostile act such as the conveyance of the lands demised by the tenant for years, during his term, to another in fee simple by deed duly recorded, it is the duty of the landlord to protect his title by regaining possession; and the open, adverse, and continuous possession of the purchaser from the tenant or those claiming through him, under a claim of title for twenty years, raises a legal presumption of a grant from the true owner in fee, which can only be rebutted by positive proof. Such presumption is independent of the statute of limitations, and applies to subjects not within or expressly excluded from the operation of such statute.

LANDLORD AND TENANT.—CONVEYANCE IN FEE of the demised premises by a tenant for a term of years is a fraud upon the landlord, and gives him the right, to recover possession of the land, by action at any time within twenty years immediately following the execution of the deed.

LANDLORD AND TENANT—CONVEYANCE BY TENANT—NOTICE.—Recording a fee simple deed to demised land, executed by a tenant for a term of years, is notice to the landlord of the execution of the deed when the grantee goes into possession thereunder.

J. A. McCullough, for the appellant.

Cothran, Wells, Ansell & Cothran, and Haynsworth & Parker, for the appellee.

100 **POPE, J.** Under the will of Thomas Wadsworth, who died in 1791, while a citizen of Charleston, in this state, certain lands within the limits of this commonwealth were devised to trustees to maintain and support a free school for poor children residing within the limits of Major Dunlap's

battalion of the Saluda regiment within Laurens county. The general assembly of this state, appreciating the spirit of this devisor, and the better to protect these lands from the rapacity and cupidity of those persons who would likely seek an advantage of the trustees under this will, passed an act on the fourteenth day of December, 1805, whereby these lands were relieved from the operation of the act of limitation: See 5 Stats. 496. Again, at the request of the trustees under the will of Mr. Wadsworth, the general assembly, on the twentieth day of December, 1810, passed an act whereby these trustees and their successors in office were incorporated by the name of the "Trustees of the ¹⁷⁰ Wadsworthville Poor School," with the usual privileges enjoyed by similar corporations: See 5 Stats. 621.

This corporation thus created, on the fifteenth day of April 1818, leased three hundred and thirty acres of the land devised under the will of Thomas Wadsworth unto one Thomas G. Walker, for the term of seventy-five years, the same beginning on the twelfth day of December, 1815, and ending on the twelfth day of December, 1890. This lease was for valuable consideration, and was by a deed therefor, which deed of lease was duly recorded in the office of the register of mesne conveyance for Greenville district (now county), where the said leased land was situated. This lease was by Thomas G. Walker assigned to one David McNeely on the 19th of October, 1821, and David McNeely assigned the same to one John P. Pool on the fifteenth day of February, 1847. Afterward John P. Pool, by his deed therefor, conveyed one hundred acres in fee simple, as it is agreed by the parties to this appeal, to Fagin E. Martin, but in the deed itself recited all the foregoing facts, and this deed was duly recorded in the office of the register of mesne conveyance on the 30th of January, 1850. Under a judgment against Fagin E. Martin, this land was sold as Martin's property, on the 6th of January, 1857, by the sheriff of Greenville district to Charles J. Elford. After Mr. Elford's death, and in the settlement of his estate, this land was sold and conveyed by the commissioner in equity to Beeco on the 7th of October, 1867. Beeco sold and conveyed to Choice, January 21, 1876. Choice sold and conveyed to Davis, January 21, 1876. Davis sold and conveyed to Kennemore and Tate, December 4, 1879. Kennemore purchased by deed therefor Tate's interest. Kennemore sold and conveyed a part of the land to McGee, January 1,

1891. McGee sold his part by deed therefor to L. I. Jennings, on the 23d of February, 1891. Kennemore sold his part by deed to L. I. Jennings, on the 23d of February, 1891. All these several deeds were duly recorded in the office of the register of mesne conveyance for Greenville county.

On the twenty-fifth day of April, 1892, in the court of common pleas for Greenville county, the plaintiff, the trustees of the Wadsworthville Poor School, brought an action against the defendant, L. I. Jennings, to recover sixty-two and one-fourth acres of the land, and ¹⁷¹ in the complaint disclosed plaintiff's title, the lease and its termination, demanding the recovery of the land, and two hundred dollars as rents and profits. The defendant, in his answer, admitted the possession of the land in controversy, but denied plaintiff's title and right to recover land, or rents and profits; further, that beginning on the 4th of December, 1879, he had been in the exclusive and continuous possession of the land sued for, claiming the same as his own adversely to the plaintiff and all the world; further, that he, and those under whom he claims, had been in the continuous adverse possession of the premises for forty years, claiming the same as their own, and holding adversely to the whole world; further, purchaser for valuable consideration without notice and adverse possession thereunder for more than ten years; that Kennemore, through whom he claimed, had made valuable improvements, in value one thousand dollars, and that he believed he had a good title in fee in said premises, which sum he claims of the plaintiff; and lastly, that the defendant, and those under whom he claims, have had exclusive, adverse, and continuous possession of the premises in dispute, claiming a fee simple title against all the world for over twenty years.

On the third day of December, 1892, the action came on for trial before Judge Aldrich and a jury, in the court of common pleas at Greenville, when a verdict was rendered for the defendant. After a verdict had been found for defendant, plaintiff moved for a new trial upon the minutes. This motion being denied, a judgment was duly entered, from which the plaintiff now appeals upon the following grounds:

1. Because the presiding judge erred in instructing the jury: "That if one or more of these purchasers from Walker took a fee simple deed and went into possession of it, claiming that he had the entire and exclusive right to that land,

went into it and took possession of it under such deed, and make it known, or this fact became known, to the trustees, the plaintiff here, then their title by adverse possession began to run"; whereas, he should have charged, as argued by the plaintiff: (a) That neither Walker, nor any one claiming through him, could plead adverse possession during the term of the aforesaid ¹⁷² lease; (b) that, by reason of the act suspending the statute of limitations as to these lands, no person could plead, as against the plaintiff, title by adverse possession; (c) that before the said Walker, or any one claiming through him, could avail themselves of title by prescription or presumption, they would have to show that their holding was not permissive, and this they could not do during the term of the aforesaid lease; and (d) that in no case can a tenant dispute the title of his landlord, until he has surrendered possession of the lands to his landlord, giving clear and unequivocal notice of his intention to hold adversely, and re-enter in his new capacity; not until then would he begin to hold adverse.

2. Because his honor erred in instructing the jury: "If the plaintiffs had notice of it, that there was somebody in possession of their lands, claiming it as his own, they had a right to bring their action against him as trespasser, and if they had a right to sue him, and he was not sued, and they allowed him to stay there for forty years, that trespass would ripen into a good title." Because (a) plaintiff could not bring action of ejectment until the termination of the said lease; (b) if plaintiff had had such cause of action, that would not convert the holding of the party in possession under that lease from permissive to adverse; (c) there could be no such adverse holding of these lands as could ripen into title; (d) Walker and all claiming through him were estopped from disputing plaintiff's title.

3. Because his honor erred in charging the jury: "Did Jennings, or any one of his ancestors, go in there and take possession under that title, and was that fact known to the trustees? If the trustees knew that such a party was in possession of that land claiming a title adverse to them they should have acted, and, if they stood by for twenty or forty years, they slept on their rights." Because (a) the said law was wholly inapplicable to the facts proven in this case, inasmuch as there was no proof whatever, either on the part of plaintiff or defendant, that the plaintiff knew at any time

that there was any person in possession of these lands holding adverse to them; (b) they were not estopped from suing for the said lands at any time.

¹⁷³ 4. His honor erred in charging the jury that the defendant Jennings could avail himself by way of purchase of any right, title, or interest any one through whom he claimed might have had by adverse possession; because (a) a person, to avail himself of the plea of title by adverse possession or prescription, must show that he, as well as those through whom he claims, held adversely.

5. His honor erred in instructing the jury as law applicable to this case: "If one goes into possession of land under color of title, or acquires possession of land, and holds it for twenty years, or when a man has possession of lands, and holds it for four or five years, and he conveys it to another, who holds it under his title, and so on for twenty years, and you establish a continuous holding for twenty years, if that possession and title was continuous and adverse, as it states here, for the period of forty years or twenty years, that would presume a grant." Because (a) there was no room for any such presumptions in this case.

6. Because the charge of his honor was not only erroneous, but conflicting, confusing, and misleading, inasmuch as he instructed the jury in one portion of his charge that a tenant would have to yield to his landlord the possession of his lands before he could hold adverse to him, and, after having charged that those taking under Walker took subject to his rights and disabilities, in a subsequent portion thereof he charged that if Jennings or any of his ancestors went into possession of that land under fee simple deed, or held it adversely, and the plaintiff knew of that fact, the statute would begin to run against the plaintiff.

7. Because the circuit judge erred in refusing plaintiff's motion for a new trial, as the verdict of the jury was without a jot or tittle of evidence to support it.

It now remains that we should present our conclusions upon the several grounds of appeal. It being an appeal from the law side of the court below, we are, by law, confined to errors of law in the circuit judge, and these errors are confined to his charge to the jury, there being no exceptions ¹⁷⁴ to any refusal by the judge to charge any requests on either side.

We have devoted unusual care to the investigation of the

principles of the law of real property in this state, for the discussion of the several questions by the respective parties to this appeal have made such a course on our part necessary by reason of the ability and research of counsel here engaged. Time will not allow us to reproduce the law which was consulted in such investigation in this opinion. To admit that, at times, we were doubtful whether the circuit judge had not erred in some of his instructions to the jury we freely admit. A careful comparison of the views of the circuit judge with those embodied in the judgments of our own court of last resort in previous similar cases have enabled us to reach a conclusion in accord with that expressed by the circuit judge.

In his charge to the jury in the case at bar by the circuit judge, and from which there is no appeal, the deed from the plaintiff corporation under which Thomas G. Walker obtained possession of the land in dispute, was declared to be a lease for a term of years, which expired on the twelfth day of December, 1890. This lease was duly recorded in the office of the register of mesne conveyance for Greenville county, wherein the land was situated, in 1823, many years before any rights of the defendant, or those through whom he claims, originated. There can be no question but that a lessee is precluded from a denial of the title of his landlord. Indeed, the possession of the lessee is that of his landlord; it is permissive and not adverse. It is equally certain that, under the law, the lessee has no seisin of the land, and without seisin, either actual or constructive, there can be no title to land. A lessee has no estate in the lands demised to him; his term, under the law, is but a chose in action, or chattel interest. The right of the landlord, as against the lessee or his assigns, to obtain possession of the lands demised, must usually be preceded by an entry thereon. It is in regard to this right of entry by the landlord during the continuance of the lease that so much legal learning has been employed during the last centuries. Herein are involved the doctrines of forfeitures arising ¹⁷⁵ from the breach of conditions or covenants contained in the lease, or such covenants running with the land as the law itself implies.

In the case at bar the lease expresses no covenants by the lessee. The single covenant is by the plaintiff corporation, whereby possession of the leased premises to Walker, his executors and assigns, is warranted during the term. There is

no restriction upon Walker, the original lessee, to assign or sublet the term. Accordingly, he does assign the lease, and, by successive assignments, duly made, the lease vests in John P. Pool. By the case it is agreed that Pool, by deed in fee simple, conveyed this leased land to one Fagin E. Martin in the year 1850, and that such deed was duly recorded in the office of the register of mesne conveyance for Greenville county (then district), and that the said Martin entered into possession under such deed. We would remark, in passing, that we do not mean to commit ourselves to the construction of this deed as amounting to one in fee simple; for of this we may doubt whether, in strictness of law, in view of its terms, any thing more than an assignment of the original lease was contemplated or expressed by the parties. The parties to the appeal, however, have stipulated that the terms of this deed were those usual in one conveying an estate in fee simple, and we suppose we are bound to give effect to their agreements, and this we the more readily do inasmuch as the entire deed is not exhibited in the case. In 1857 C. J. Elford, at sheriff's sale, purchased Martin's entire estate in the land. His deed therefore was duly recorded. Elford, that year, 1857, conveyed to one Thomas H. Cole as in fee simple. This deed was duly recorded. Said Cole reconveyed to Elford by deed in fee simple in 1867, which deed was duly recorded. Elford having died in the year 1867, the court of equity, under a bill filed by his widow and executrix, as complainant, against his heirs at law and creditors as defendants, sold the lands, and a deed, in the form of a fee simple deed, was made to the purchaser, one Miles R. Beeco, for this land, which deed was duly recorded. Beeco entered into possession under his deed. And so deeds in fee simple were made from purchaser to purchaser successively, until title rested in the present defendant. Valuable ¹⁷⁶ improvements were placed upon the premises by one of the intermediate purchasers.

It is contended by the appellant that inasmuch as he has traced title to himself, and thereafter, by lease, the possession of the lands, to one Walker, whose assignment was traced as far and into one John P. Pool, that although Pool conveyed by a deed in fee simple to one Fagin E. Martin (from whom such possession was derived by others, successively, by deeds in fee simple down to the defendant), that the possession of defendant is plaintiff's possession, and he is entitled to re-

cover, the lease having expired before action brought. To establish this proposition, he maintains most earnestly that, as by the terms of the original lease, Walker was allowed to assign his term, and did actually do so, that such assignee was by operation of law bound to hold possession for the original landlord. Such does seem to be the law governing leasehold estates. This distinction exists between a subletting and an assignment of the lease: If a lessee sublets, his tenant is bound to his lessor, but if a lessee assigns the lease, then the original lessee is evolved, and the relation of landlord and tenant subsists between the owner as landlord and the assignee as lessee, subject to all the provisions of the original lease.

By an examination of the lease in the case at bar it will be found that no covenant is expressed that possession will be surrendered by the lessee or his assignee to the landlord at the expiration of the lease, to wit, on the twelfth day of December, 1890. On investigation we find that it is an open question in this country, whether a covenant running with the land to surrender the demised land at the end of the term in the hands of an assignee, when the lease contains no such covenant, is implied by law. So it was held in Massachusetts (*Sargent v. Smith*, 12 Gray, 426), though an English case holds directly that such a covenant is not implied by law: *Doe v. Seaton*, 2 Crompt. M. & R. 730. Still, it is settled law, that at the expiration of the term the landlord may regain possession of his lands on demand if he can, by suit if he must. Hence, it would seem that the appellant can maintain this proposition. The authorities directly hold that a lessee can legally only assign ¹⁷⁷ such an interest as is covered by his lease, and that this is true, no matter what may be the form of the deed whereby he (the lessee) conveys. Mr. Tyler, in his work on Ejectment and Adverse Possession, at page 208, says: "When the relation of landlord and tenant is once established, it attaches to all persons who succeed to the possession of the premises through or under the first tenant; and they are all as much bound by the covenants and agreements of the original lessee as though they were their own." Again, at page 881, the same author holds: "And the rule, that, where the relation of landlord and tenant exists, a conveyance by the latter of the demised premises cannot operate as the basis for an adverse possession, so as to bar the former of his ejectment, means

the conventional relation of landlord and tenant, when some rent or return is in fact reserved to the former, not a relation arising from mere operation of law; as where one makes a grant, and, by the omission of the technical word 'heirs,' an estate for life only passes." So, too, Mr. Washburn, in his work on the Law of Real Property, at page 486, says: "So, if a tenant under a lease were to convey the estate in fee to a third party, he would have no better right to contest the title of the lessor than the lessee himself." Mr. Angell, in his work on Limitations, thus states the rule, page 456: "It seems to be also settled that when the relation of landlord and tenant is once established it attaches to all who may succeed the tenant, immediately or remotely; and that a succeeding tenant is as much disqualified to set up his possession against the original landlord as the first tenant."

Nor do we perceive any difficulty to the plaintiff corporation by the purchase by Elford, at sheriff's sale, of Fagin E. Martin's interest in the land, for unquestionably if Martin, as assignee of the lease, held the lands in question as a tenant to the original landlord (the plaintiff corporation), the sheriff could only legally convey such an estate as was in Martin, and Elford would, by his purchase, assume all the relations to the landlord, with all their legal consequences, and is estopped from denying the tenancy: *Willison v. Watkins*, 3 Pet. 50.

With all these concessions, however, the appellant does not find his way clear to a recovery, for such provisions only apply ¹⁷⁸ to a continuous, unbroken tenancy, wherein the relation of landlord and tenant subsists, as such, in law and fact, to those instances where an adverse use of the leased premises do not operate as a bar to their recovery by the landlord. The appellant, with ability, contends that, in order to enable a tenant to controvert his landlord's title, he must first deliver up possession of the leased premises to his landlord; that the tenant cannot disclaim his tenancy, or put himself in the position of an adverse claimant, or originate in another any such adverse holding, while the tenant withholds possession from his landlord. Indeed, he goes so far as to suggest that the doctrine of disclaimer, and also surrender by parol, can never be applied to the relation of landlord and tenant created by deed, but that such doctrines only apply to such instances as tenancies at will, or such as are created by parol. He cites the cases of *Love v. Dennis*, Harp. 70; *Whaley v.*

Whaley, 1 Spear, 225; 40 Am. Dec. 594; *Syme v. Sanders*, 4 Strob. 196; *Wilson v. Weathersby*, 1 Nott & McC. 373; *Williams v. Morris*, 95 U. S. 444; *Floyd v. Mintsey*, 7 Rich. 188; *Thomson v. Peake*, 7 Rich. 353. It must be admitted that these cases are instances of tenancies not created by deed. He would include, also, *Willison v. Watkins*, 3 Pet. 50, and *Zeller's Lessee v. Eckert*, 4 How. 289; but, as we remember these two cases last cited, in the former, possession was obtained by Willison under a power of attorney from the owner, and, in the latter, possession was derived by devisor's widow under a provision of her husband's will, by which he devised the fee to his son, but carved out an estate for years for his widow; and in both these cases the United States supreme court sustained the title of the tenant, and those claiming under him, under a disclaimer of landlord's title and other circumstances.

Under the view we take of the law of this state governing cases of the character of that at bar, we are not left to deal with all these refinements of the law; for we take it that it is now fully established that wherever the relation of landlord and tenant is terminated by any hostile act, such as the conveyance of the lands demised to the tenant for years, during such term, to another in fee simple, it becomes the bounden duty of the landlord to protect his title by regaining possession; ¹⁷⁹ that the statute of limitations cuts no figure as affording a protection against the rights of the landlord, for the simple reason that statutes of limitations only apply to those instances where the possession is tortious *ab initio*, whereas, in the other instance we shall hereafter unfold, the possession *ab initio* is not tortious. It need not be that the first possession shall be under deed, though in the case at bar it was so. The theory of the law, in such cases, is that the possession of the land is such as includes a seisin of the premises, and such seisin in the person in possession of the land is incompatible with possession as a tenant, and after the lapse of twenty years such possession, under a claim of title, will draw to it the presumption of a grant from the true owner in fee. Of course this possession must be adverse, open, continuous.

The court of last resort in this state, in an action wherein the present plaintiff corporation was plaintiff (*Trustees of Wadsworthville Poor School v. Meetze*, 4 Rich. 50), held that the deed of Rall, the lessee of plaintiff, whereby he conveyed

the land demised to him unto Meetze by a fee simple deed, was a disclaimer of Rall's tenancy, and the plaintiff might have sued without notice to quit and before the termination of the lease; but in the case cited Meetze failed in his defense, because the twenty years had not elapsed since the making of the deed from Rall to him. The doctrine of presumption of title arising from great lapse of time, twenty years or more, has been recognized and enforced in this state for many years and in many cases: *McClure v. Hill*, 2 Mill Const. 425; *Smith v. Asbell*, 2 Strob. 141; *McLeod v. Rogers*, 2 Rich. 22; *Trustees of Wadsworthville Poor School v. McCully*, 11 Rich. 429; *Thompson v. Brannon*, 14 S. C. 552. In the case of *Trustees of Wadsworthville Poor School v. McCully*, 11 Rich. 429, Judge Wardlaw, in delivering the opinion of the court, amongst other things, said: "The presumption is founded upon the supposed acquiescence of the person shown to have been the former owner, and infers such transfer of his right as legalized the enjoyment." But it is apprehended that the presumption need not necessarily be founded upon the supposed acquiescence of the person shown to have been the former owner; it may be bottomed upon the ¹⁸⁰ presumption of any other title to the premises, which could, by being united to possession, give good title to lands.

It may be well to notice the distinction as to the extent and effect of this presumption, as drawn by Judge Wardlaw in the case of *Trustees of Wadsworthville Poor School v. McCully*, 11 Rich. 429, and that on the same subject by Judge Evans in *Smith v. Asbell*, 2 Strob. 146. Judge Wardlaw seems to give force to the presumption as one of fact, that, by operation of law, has acquired such an artificial force that the jury may be instructed to allow it a controlling influence. His words in this connection are: "The presumption of title arising from long-continued possession, unquestioned and unexplained, was not held to be a presumption *juris et de jure*, irrebuttable, such as the court might make, nor even one that the jury were bound to make without regard to the circumstances which contradicted it; but it was considered a presumption of fact, to which an artificial force is ascribed by the law, and which the jury were recommended to make, not because they believed the fact, but because it is wise and expedient to respect what is consecrated by time, and to give the same measure to all in the same condition, by giving effect to the fixed period of twenty years

as a rule, instead of producing the uncertainty and inequality which must result from the various impressions which circumstantial evidence makes upon various minds: See *McClure v. Hill*, 2 Mill Const. 425; *Hillary v. Waller*, 12 Ves. 266. This presumption is like the presumption of the payment of a bond after twenty years unexplained, and like the presumption of right that arises from the enjoyment of an easement for twenty years."

Judge Evans, in the case cited of *Smith v. Asbell*, 2 Strob. 146, said: "In the elementary books (see Starkie on Evidence, pt. 4, 1240), presumptions are said to be of three kinds: 1. Presumptions of law, which correspond with the *presumptio juris et de jure* of the civilians. These are conclusive, and cannot be rebutted; 2. Presumptions of law and fact. These are like the *presumptio juris* of the civil law. Of these the presumption of payment of a bond or of a grant after twenty years is an illustration. The third kind are presumptions of fact, and are mere inferences calculated to produce belief, and have no legal efficacy beyond their tendency to satisfy the mind of the truth of ^{the} alleged fact. . . . But presumptions of law are like the statutes of limitations. They are artificial rules, which have a legal effect independent of any belief, and stand in the place of proof until the contrary be shown. The presumption in the case under consideration, if it exists, belongs to this class, and the question we are to decide is, whether there was any thing in the case which required of the circuit court the instruction to the jury that they might presume the existence of the deed in question. The rule laid down in *McClure v. Hill*, 2 Mill Const. 420, is that a continuous, adverse possession of twenty years raises the presumption of a grant in the absence of any of those facts which go to rebut the presumption. This rule has been followed in all the subsequent cases. . . . The facts necessary to authorize the presumption are that the possession was adverse, and that it was continuous for twenty years."

The distinction between the views of these two judges, both eminent and safe advisers, seems to us to consist in this—that Judge Wardlaw seems to leave it as a fact to be treated of by the jury as they may deem best; or, in other words, that the jury are at liberty to disregard it in making up their verdict. Not so with Judge Evans; for, if the presumption is not rebutted by proof of facts that negatives its existence, the

jury must accept it as conclusive in an issue of title. It seems to us the views of Judge Evans are more consistent than those of Judge Wardlaw, for if the presumption arises from possession for twenty years, which is adverse, open, and continuous during those years, and which presumption is not rebutted by proof of any facts, it should be regarded as a rule of law, and not, therefore, to be disregarded by the jury. By this course the same measure is meted out to all alike.

The propriety of such a rule is very well set forth in the opinion of Mr. Justice Baldwin in *Willison v. Watkins*, 3 Pet. 52, 53, who, having referred to the cases of mortgagor retaining possession after breach of condition, the cases of tenants in common, where one tenant, whose possession was for all other tenants in common, denies the tenure, ousts the other tenants, and receives all the rents and profits to his own exclusive use, ¹⁸² and also trustees who disavow their trusts, and those cases of fraud after its discovery, then said: "All these principles bear directly on the case now before us; they are well settled and unquestioned rules in all courts of law and equity, and necessarily lead to the same conclusion to which this court has arrived. The relations created by a lease are not more sacred than those of a trust or of a mortgage. By setting up or attorning to a title adverse to his landlord the tenant commits a fraud as much as by the breach of any other trust. Why, then, should the statute not protect him as well as any other fraudulent trustee, from the time the fraud is discovered or known to the landlord? If he suffers the tenant to retain possession twenty years after a tenancy is disavowed, and cannot account for his delay in bringing his suit, why should he be exempted from the operation of the statute more than the mortgagor or the mortgagee? We can perceive no good reasons for allowing this peculiar and exclusive privilege to a lessor; we can find no rule of law or equity which makes it a matter of duty to do it, and have no hesitation in deciding that in this case the statute of limitations is a bar to the plaintiff's action."

Before going further it may be well to recur a moment to the proposition of law regulating the force and effect of presumptions; for in that connection we remarked that they were rebuttable by proof of facts inconsistent with such presumptions. We mean that, if, when such a presumption is relied upon, it is proved that during the pendency of the lease, and during the period of time claimed to raise the presump-

tion, any admission of title in the landlord, such as the payment of rent, or like circumstance, can be proved, it will rebut such presumption—any proof, in fact, that negatives the adverse holding and its continuity, will defeat the presumption.

As before remarked, the legislature of this state has prevented any plea of the statute of limitations to defeat the plaintiff corporation's rights in these Wadsworth lands, but by two decisions of the court of last resort in this state, and to both of which actions this plaintiff corporation was party plaintiff (we refer to *Trustees of Wadsworthville Poor School v. 183 Meetze*, 4 Rich. 50, and to *Trustees of Wadsworthville Poor School v. McCully*, 11 Rich. 429), it was held that although the statute of limitations could not be pleaded to bar such plaintiff corporation, yet that the legislature did not interdict the defense of the presumption of title or grant arising from twenty years' adverse, open, and continuous possession, which was not rebutted by proof of facts inconsistent with such presumption. In the latter case, just cited, it was held: "The presumption is independent of the statute of limitations; it applies to subjects not within the statute, and it depends upon principles which would operate if there was no such statute. . . . The period of twenty years was originally adopted in analogy to the English statute of limitations; but it has no connection with our statute. It would be a great stretch of the special indulgence given by the suspending act to say that thereby the plaintiff was not only shielded against the effect of ten years' possession (five in 1805), but was indemnified against all the effect of time and acquiescence."

Again, it has seemed to us that the character of this adverse holding, originating in the possession of the premises under a deed purporting to convey these premises in fee simple, and promptly placed upon record in the office of the register of mesne conveyance in the proper county more than forty years before this action was brought, is entitled to great weight, not such as obtains from a matter of record, as it is known in the law. The registry of deeds does not rank in this way; for only judgments of courts of record when entered upon the records of such courts can claim this distinction, but we mean that notice is given by recording in the office of the registry of mesne conveyance, and especially the deed from a vendor to a vendee. By a deed of conveyance

in fee simple the vendor separates himself from the land conveyed, and the vendee under such deed has no further connection with his vendor, the purchase money having been paid. Chief Justice Marshall, in *Blight's Lessee v. Rochester*, 7 Wheat. 535, very aptly brings this in view, when he says, at page 547: "The propriety of applying the doctrines between lessor and lessee to a vendor and vendee may well be doubted. The vendee acquires the property for ¹⁸⁴ himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon, in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is either the letter or the spirit of the contract violated by it."

We have endeavored to make our meaning plain in regard to the effect of these deeds of conveyance in fee simple. We regard the first of such conveyances as a fraud upon the rights of the landlord, and as giving him a right of action to recover possession of such leased premises immediately after the execution of such deed, and that such right of action, if brought at any time within twenty years immediately following the execution of such deed, would have restored the land demised to the plaintiff corporation. This brings us up squarely to the question, When was he bound to take notice of such deed? Unquestionably, if the fact of the execution of the deed had been brought to the actual attention of the plaintiff corporation at its date, he would have been so bound. But will not the possession be under the deed, and its being recorded in the office of the register of mesne conveyance for Greenville county have a similar effect? We think so.

It was unfortunate for the plaintiff corporation that the rent for the term was a sum in gross paid by the tenant at the beginning of the lease, for the reservation of a yearly rent of "one barley corn" was purely nominal. If the rent had been reserved to be paid annually the landlord would have looked more closely after his rights in the premises. But the landlord and his tenant had the right to contract as they did, and, if these misfortunes had not occurred, the landlord's

right to have recovered the demised premises at the expiration of the lease (1890) would have been unquestioned. The grand object of the creation of the trustees into a body corporate was ¹⁸⁵ to enable them all the more readily to discharge the trusts created by the will of Thomas Wadsworth, deceased. The corporation is liable under the law to sue and to be sued. They can recover their rights under the law as well as can private individuals, and they are as liable to lose those rights by a failure to sue as are private individuals, except as affected by statutes of limitations. This presumption would have matured against a private individual. So it will against such corporation. We must overrule all the grounds of appeal numbered, respectively, 1, 2, 3, 4, 5, 6.

The appellant complains that the circuit judge should have granted a new trial. So far as this request of appellant relates to questions of fact this court is powerless to interfere. So far as it relates to misconceptions of the law by the circuit judge, from what we have already said, no error is to be imputed to the judge.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McGOWAN, J. Under the authority of the decided cases, I concur.

McIVER, C. J. I concur in the result reached in this case, though, I must confess, after much hesitation. It seems to me that, inasmuch as the grantor cannot convey any greater estate or interest than that which is vested in him, the several conveyances, purporting to be dec'ds in fee simple, operated only as assignments of the original lease to Walker; and hence the several holders under those deeds, including the defendant, held under that lease, and their possession was, therefore, permissive and not adverse. At least, this was so until some act was done amounting to a forfeiture of the lease, of which the plaintiff had notice more than twenty years before the commencement of this action. I was unable to see how the plaintiff could maintain an action against any one of the several holders of the land, before the termination of the lease, for all that the defendant would have to do in such a case would be to throw himself upon his rights as assignee of the lease, and thus defeat the action. But the case of the *Trustees of Wadsworthville* ¹⁸⁶ *Poor School v. Meetze*, 4 Rich. 50, decides, as I understand it, that the lease

to Rall "did not prevent the plaintiffs from suing the defendant, whose possession under the conveyance in fee simple from Rall was clearly adverse. The conveyance in fee simple was a disclaimer of Rall's tenancy, and the plaintiffs might sue without notice to quit, and before the termination of the lease," provided the plaintiffs had notice of such adverse holding. For it will be observed that the third instruction to the jury (affirmed by the court of appeals) was that, "if Rall's possession was permissive, his declaration to Taylor (even if made after the supposed lease), that he would claim under the statute of limitations, could not convert his permissive possession into an adverse possession, without notice to the plaintiffs of such adverse holding." This case, therefore, is decisive of the point, and my doubts must yield to its authority.

Another point of doubt is the question of notice to the plaintiff that the several parties were claiming to hold the land adversely under the fee simple deeds. I do not think that the record of these deeds operated as constructive notice to the plaintiff, for, as I understand the rule, a party is bound to look up, but not down, the line. As is said in 20 American and English Encyclopedia of Law, 596: "The operation of the record as notice is prospective and not retrospective." Hence, as is there said: "A prior mortgagee cannot be charged with notice of, and cannot be affected by, a subsequent mortgage or deed by the mere record thereof": See, also, *Lake v. Shumate*, 20 S. C. 32, to the same effect. The jury having been instructed in accordance with this view, it then became a pure question of fact, as to whether the plaintiff had actual notice, and, if they erred in their finding as to such fact, such error is beyond our reach. The remedy was by a motion before the circuit judge for a new trial, which seems to have been unsuccessfully resorted to. If, in fact, there was no evidence of such notice (which, I must say, seems to me was the case), then the circuit judge should have granted a new trial; but, even if there was error in this respect, this court has often held that it was without jurisdiction to correct such error.

Judgment affirmed.

¹⁸⁷ In this case a petition was filed praying for a rehearing. This petition was refused by an order filed January 20, 1894.

PER CURIAM. After a careful examination of this petition we are unable to discover that any material question of fact or principle of law has either been overlooked or disregarded, and, therefore, there is no ground for a rehearing. For the purpose, however, of preventing any misconception as to the real ground upon which the decision rests, we deem it best to say that it is a mistake to suppose that the remarks made in the leading opinion, implying, possibly, that the recording of the fee simple deeds might operate as constructive notice, constituted a ground for the result reached. These remarks were thrown out by the justice who prepared the opinion as an additional reason for the view taken, which, however, as shown by the remarks of the other two justices in concurring in the result, should not be regarded as one of the points decided in the case.

Petition dismissed.

LANDLORD AND TENANT—TITLE BY PRESCRIPTION.—The grantee of a tenant at will, under a deed purporting to convey the fee, may, by entering under such deed and holding possession openly and notoriously for himself, for seven years, become vested with title by prescription as against his grantor's landlord: *Doak v. Donelson*, 2 Yerg. 249; 24 Am. Dec. 435.

PRESUMPTION OF TITLE ARISING FROM POSSESSION: See *McCullough v. Wall*, 4 Rich. 68; 53 Am. Dec. 715, and note, showing when a conveyance or deed may be presumed: *Casey v. Inloes*, 1 Gill, 430; 39 Am. Dec. 658.

PRESUMPTION—ADVERSE POSSESSION—STATUTE OF LIMITATIONS.—The presumption of a grant from adverse possession is not rebutted by a prevalent opinion in the neighborhood as to the party's legal rights, even though known to, and adopted by, him; nor is the statute of limitations thereby prevented from running: *Casey v. Inloes*, 1 Gill, 430; 39 Am. Dec. 658.

RECORDED DEED AS NOTICE: See notes to *Hockenhull v. Oliver*, 12 Am. St. Rep. 238; *Ely v. Wilcox*, 91 Am. Dec. 441; *Chamberlain v. Bell*, 68 Am. Dec. 262; *Cowles v. Bacon*, 21 Conn. 451; 56 Am. Dec. 371; note to *Parker v. Conner*, 45 Am. Rep. 188.

STATE v. GREEN.

[40 SOUTH CAROLINA, 328.]

CONSPIRACY—EVIDENCE.—After a conspiracy is ended, and its object has been actually reached, the declarations of one conspirator are not admissible in evidence against the others.

WITNESSES—OPINION EVIDENCE.—On a criminal trial a witness may testify to the peculiarities of the foot of the accused, and how these peculiarities were reproduced in a certain foot track; but he cannot give his opinion that such track was made by the accused.

THE grounds of appeal mentioned in the opinion are as follows: "1. Because his honor erred in refusing to charge the jury that if they believed that any confessions introduced in evidence were not made freely and voluntarily, without any inducement or circumstances inciting hope of favor in the mind of the accused, or without any threat or violence producing confusion or fear of punishment in the mind of the accused, they must not take such evidence into consideration; 2. Because his honor erred in charging the jury, that whether the confessions of George Bowers and Cannon were admissible in evidence, was a question for the court and not for the jury, and after it goes to the jury they are not to consider the question of its admissibility, and whether or not they believe it, and its force and effect; 3. That his honor erred in allowing state's witness D. H. A. Mason to make prejudicial remarks on the witness-stand not connected with the case, and calculated to inflame the minds of the jurors against the prisoners; 4. Because his honor erred in allowing state's witness D. H. A. Mason to give his opinion as to when Charley Green ought to have been hung, and also to name special instances of his bad conduct; 5. Because his honor erred in allowing state's witness T. L. Johnson to give his opinion that a certain track found in the field was that of the defendant, Charley Green; 6. Because his honor erred in ruling that, if a conspiracy was established, the confession of one codefendant is the testimony of all; 7. (Abandoned.) 8. Because his honor erred in charging the jury that, in order to constitute guilt in a felony, it is not necessary that all the parties charged should actually participate in the act which, of itself, constitutes the offense. If they are present, knowing of, aiding, abetting, concurring, inciting, participating in any way, they are all in felonies upon an equal footing—they are all principal felons; 9. Because his honor erred in stating to the jury that 'it is proven here, and admitted, that the house

was set fire to in the night-time and consumed by others than the owner thereof;' 10. Because his honor erred in admitting in evidence the confessions of George Bowers and Wade Cannon."

J. W. Nash, for the appellant.

Schumpert, for the state.

329 POPE, J. The appellant was tried and convicted of the crime of arson at the July term, 1893, of the court of general sessions for Laurens county, and, after having been duly sentenced, has appealed therefrom. His grounds of appeal, ten in number, will be set out in the report of the case, and hence will not be reproduced here. After a careful examination of these suggestions of error we find that two are well taken, thereby necessitating a new trial in the court below.

The first of these is raised by an exception at the trial to the competency of the confessions of two defendants, of whom the appellant was not one, made after the crime had been fully consummated, to affect the accused, who was not a party to such confession, on the alleged ground as ruled by the circuit judge, "that, if a conspiracy is established, what one says is the testimony of all." Such is not the rule of law. The circuit judge for the moment overlooked **330** the marked distinction between the acts and declarations of parties to a conspiracy before the object is actually reached, on the one side, and the acts or declarations of any party to such conspiracy made after the object of the conspiracy is reached, on the other side. There is no doubt but that, when persons have banded themselves together to accomplish some crime, every word or act of each conspirator, in furtherance of such accomplishment of the crime, binds every other of such conspirators. But it is equally true that, when once a conspiracy is ended, no such ligament binds each co-conspirator, so that a confession of any one or more of such co-conspirators binds all who conspired. The confession binds him who makes it, but not his fellow-conspirators: *State v. Dodson*, 14 S. C. 628; *State v. Brown*, 34 S. C. 46; 1 Greenleaf on Evidence, sec. 333.

The next error below consisted in allowing Mr. Thomas L. Johnson, a witness for the state, to give his opinion that a track in dispute was made by the accused, Charles Green, against the objection of his counsel. The witness was evi-

dently intelligent and conscientious. It was perfectly competent for him to trace minutely before the jury the peculiarities of the foot of the accused, and also how these peculiarities were reproduced in the track the witness saw. Beyond this, we fear, he ought not to have been required to go; we mean, in expressing his opinion that the track was made by Green. Such an inference should have been left to the jury: 1 Greenleaf on Evidence, sec. 440; *State v. Senn*, 32 S. C. 400.

We do not deem it our duty, having been forced to the conclusion that a new trial must be had, to discuss the other alleged objections of the appellant, especially as we find no error there.

It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded, to the end that there may be a new trial of the defendant, Charles Green.

McGOWAN, J., concurred.

McIVER, J. I concur in the result only, as I am not now prepared to commit myself upon the questions raised by the first and second exceptions.

CONSPIRACY—EVIDENCE.—After the consummation of the conspiracy the declaration of one conspirator is not evidence against the others: *McKenzie v. State*, 32 Tex. Cr. Rep. 568; 40 Am. St. Rep. 796, and note.

WITNESSES—EVIDENCE—OPINION AS TO FOOTPRINTS.—One having knowledge may testify as to facts concerning footprints, but cannot give his opinion as to them: *Hedge v. State*, 97 Ala. 37; 28 Am. St. Rep. 145, and note.

STATE v. TRAMMELL.

[40 SOUTH CAROLINA, 331.]

HOMICIDE—SELF-DEFENSE.—A patron, who, finding fault with the service in a restaurant, follows the waiter into the kitchen against the protest of the proprietor, and, after provoking a difficulty, refuses to go out after the waiter has apologized, cannot avail himself of the plea of self-defense in killing the waiter, although the latter advanced upon him with a large carving-knife. In such case it is his duty to retreat if necessary, to avoid killing the waiter, or to prevent himself from being killed.

Earl & Mooney, for the appellant.

Ansel, for the state.

231 POPE, J. On the twenty-second day of December, 1892, in the city of Greenville, in this state, J. Luther Trammell gave an order to the proprietor of a restaurant for his supper. When seated in the dining-room of such restaurant, Eugene Robinson, who was the sole waiter in such dining-room, brought to the said Trammell his supper. The latter, upon discovering that one of the articles of food he had ordered was not supplied, said to the waiter, "This is not what I ordered"; to which Robinson, the waiter, replied, "You are blamed hard to please"; to which Trammell replied, "I don't want to take any insults from a damned negro," immediately leaving the dining-room. He complained to the proprietor, Mr. Legon, who promised to send him his supper over at the Windsor hotel. Becoming very much engaged with his other **232** customers, Mr. Legon neglected to send the supper over to the hotel. Some time afterward, fifteen or twenty minutes, Trammell returned to the restaurant, and said, "I am going back to see about my supper"; to which remark Mr. Legon, the proprietor said, "Luther [Mr. Trammell], for God's sake, don't have any trouble here in my place; I have had trouble enough." Although Mr. Trammell said he would not, he still went through the dining-room, through the pantry, and into the kitchen of the restaurant. Mr. Legon, the proprietor caught him by the right arm. When they entered the kitchen, the defendant, Trammell, said, cursing Robinson, the waiter, "You have insulted me," to which Robinson replied, "I beg your pardon." Trammell was much excited. Mr. Legon not only had hold of his arm, but also stood between him and the waiter, and said, "Luther, he has begged your pardon; now come on and let us go out." Trammell did not do so, but still cursed the negro. Finally, he drew his pistol and emptied the contents of two barrels of the pistol into the body of Eugene Robinson, the waiter, causing his instant death, claiming as his justification that said Eugene was advancing upon him with a large carving-knife.

At the July term, 1893, of the court of general sessions for Greenville county, the defendant, Trammell, was tried upon an indictment for murder before Judge Norton and a jury. He was convicted of manslaughter, and sentenced to four years' imprisonment in the state penitentiary. He now appeals to this court upon two grounds, substantially as follows: 1. Because the circuit judge erred in charging the jury:

"That if the defendant did go into that room, and did provoke the difficulty by his language and manner in that room, then the plea of self-defense would be gone, although the other elements of self-defense would be present in the case; and if you find that you need not consider the other elements of self-defense"; 2. Because his honor erred in charging the jury as follows: "Now, gentlemen, I desire to correct the theory of the law which the last counsel who addressed you for the defense says in his theory of the law—that a man is not bound to retreat. Our books are full of law on that subject. Our law does require that a man should retreat."

*** We are not impressed with these grounds of appeal as furnishing sufficient reasons for the reversal of the judgment of the court below. In the first place, it was not error, under the circumstances testified to in this case, for the circuit judge to charge the jury as is complained of in the first ground of appeal. Clearly, one of the foundation rocks upon which the plea of self-defense must be bottomed is that it was necessary for the accused to take the life of his fellow-man to protect his own, or to protect him from serious bodily harm: *State v. Wyse*, 33 S. C. 594; *State v. Merriman*, 34 S. C. 40. In the case at bar, every witness, on both sides, who saw the difficulty, testified that the waiter was where his duty called him to be; while, *per contra*, the accused was forcing himself into a place that the proprietor besought him not to go. Not only so, but such proprietor actually caught his arm and placed himself in the way of the accused, so as to prevent his coming in collision with the colored waiter. And, after the waiter had apologized, the proprietor again urged the accused to leave. Under these circumstances the charge of the presiding judge was exactly in line with his duty on such an occasion. It is high time that the shedding of human blood within the limits of this commonwealth should meet with a firm and stern upholding of the principles of the law of self-defense, when such defense is relied upon.

In the second place, the circuit judge was right in stating that, under the laws of this state, if it was necessary to retreat, to avoid shedding human blood, retreat should be made. Of course this relates to the class of cases under consideration here. There are cases, however, when no retreat is demanded by the law. For instance, the honor of

one's family, when in peril by the evil-minded, permits nothing save action, and no step backward is tolerated.

The judgment of this court is, that the judgment of the circuit court be affirmed.

HOMICIDE—SELF-DEFENSE, LAW OF, GENERALLY.—RETREAT: See *Commonwealth v. Breyessee*, 160 Pa. St. 451; 40 Am. St. Rep. 729, and note; *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note, where the cases are collected.

HOMICIDE—SELF-DEFENSE, WHEN NOT A COMPLETE JUSTIFICATION.—A person cannot avail himself of a necessity which he has knowingly and willingly brought upon himself. Hence, in case of a homicide, if the difficulty was brought on by the accused, for the purpose of wreaking his malice upon the deceased by slaying him, or doing him some great bodily harm, and, actuated by such felonious purpose, he does the killing, he is guilty of murder, and cannot shelter himself under the plea of self-defense: See *Carter v. State*, 30 Tex. App. 551; 28 Am. St. Rep. 944, and note. In Missouri a killing by a person who has provoked a difficulty, but without any felonious purpose, is manslaughter in the fourth degree, the plea of self-defense not being an entire justification: See note to *Carter v. State*, 28 Am. St. Rep. 953.

STATE v. ATKINSON.

[40 SOUTH CAROLINA, 363.]

TRIAL—RIGHT OF ACCUSED TO BE PRESENT.—A motion to quash an indictment does not constitute any part of the trial, and the accused is not entitled, as of right, to be present upon the hearing of such motion.

TRIAL—RIGHT OF ACCUSED TO BE HEARD.—A person accused of crime, who appears through counsel and demurs to the indictment, and makes a motion to quash it, thereby elects to be heard by counsel, and is not entitled to be heard by himself.

MURDER—INDICTMENT—PRINCIPAL AND ACCESSARY.—An indictment charging one person with murder, and another as accessary before the fact, contains but one count, and both parties may be convicted thereunder.

CONSTITUTIONAL LAW—AMENDMENTS TO FEDERAL CONSTITUTION.—The limitations upon search and seizure imposed by the fourth amendment to the United States constitution, and the fifth amendment thereto providing that no person shall be a witness against himself in a criminal case, have no application to the powers of the state governments. They apply only to the powers of the federal government. Nor has the fourteenth amendment to such constitution, preserving the privileges and immunities of citizens, extended the operation of the first-named amendment to the states.

MURDER—EVIDENCE.—On a trial for murder, papers taken from the possession of the accused, without his authority, may be used as evidence against him.

EVIDENCE—ADMISSION OF AS ERROR.—The admission of inadmissible evidence, afterwards stricken out by the court with express direction to

the jury to disregard it, is not such error as to cause reversal of the judgment in a criminal case.

CIRCUMSTANTIAL EVIDENCE IS SUFFICIENT TO SUPPORT A VERDICT if the jury believe beyond a reasonable doubt, from such evidence, that the accused is guilty.

CIRCUMSTANTIAL EVIDENCE TO SUPPORT A VERDICT OF CONVICTION must be consistent with guilt, and inconsistent with any other reasonable hypothesis, and an instruction to that effect does not submit a question of law to the jury.

THE following indictment and grounds of error on appeal are referred to in the opinion:

"STATE OF SOUTH CAROLINA, }
 "County of Fairfield. }

"At a court of general sessions begun and holden in and for the county of Fairfield, in the state of South Carolina, at Winnsboro, in the county and state aforesaid, on the third Monday of February, in the year of our Lord one thousand eight hundred and ninety-three, the jurors of and for the county of Fairfield aforesaid, in the state of South Carolina, aforesaid, that is to say, upon their oaths, present, that Jasper Atkinson, on the 28th day of January, in the year of our Lord one thousand eight hundred and ninety-three, with force and arms, at Winnsboro, in the county of Fairfield and state aforesaid, in and upon one John H. Clamp, with a certain loaded shotgun, then and there feloniously, willfully, and of his malice aforethought, did make an assault; and that the said Jasper Atkinson him, the said John H. Clamp, with the loaded shotgun aforesaid, then and there feloniously, willfully, and with his malice aforethought, did shoot, strike, penetrate, and wound, giving to the said John H. Clamp thereby, in and upon the right side of the head of him, the said John H. Clamp, one mortal wound, of which said mortal wound the said John H. Clamp then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Jasper Atkinson him, the said John H. Clamp, in manner and form, and by the means aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder. And the jurors aforesaid, upon their oath aforesaid, do further present that John Atkinson, late of the county and state aforesaid, before the said felony and murder was committed, in manner and form aforesaid, to wit, on the 28th day of the same month of January aforesaid, with force and arms, at Winnsboro, in the county and state aforesaid, feloniously, willfully, and of his

malice aforethought, did incite, move, procure, and hire, counsel, and command the said Jasper Atkinson, the said felony and murder, in manner and form aforesaid, to do and commit, against the form of the act of the general assembly of the said state in such case made and provided, and against the peace and dignity of the same state aforesaid."

The following grounds of appeal were presented by exception: "1. Because his honor erred in sending the defendants back to jail pending the consideration of the motion to quash the indictment, the defendants being thereby deprived of a constitutional right to be fully heard by themselves or their counsel, or by both, as they should elect; 2. Because his honor erred in refusing the defendants' motion to quash the indictment; 3. Because his honor erred in overruling the demurrer entered by the defendants to the said indictment. 4. Because his honor erred in that he should have held that the indictment as to the defendant Jasper Atkinson is fatally defective, in that it does not conclude 'against the peace and dignity of the state', 5. Because his honor erred in that he should have held that the indictment as to the defendant John Atkinson is fatally defective, in that it does not fully, fairly, plainly, substantially, and formally describe the offense for which he was held to answer; 6. Because his honor erred in admitting in evidence at the trial of this cause papers which had been illegally and wrongfully taken from the room of the defendant John Atkinson, without a search warrant and without authority of law; the rights of the said defendant under the constitution of this state, and under the constitution of the United States, being thereby violated; 7. Because his honor erred in admitting incompetent testimony against the defendants over the objection of the said defendants duly taken; 8. Because his honor erred in admitting testimony against the defendants which was procured by compelling the said defendants to give evidence against themselves; 9. Because his honor erred in admitting testimony that the tracks leading from the place where the body of the deceased was found to the house of the deceased were the tracks of the defendant Jasper Atkinson, after it had been made to appear that the said defendant was forced to place his foot in the said tracks; 10. Because his honor erred in charging the jury as follows; 'By way of illustration, these papers that were picked up there were circumstances. They have been proved

before you. It has been argued to you by counsel what they point out, and you are to say what these papers prove, and if they, taken with all the other facts in the case, satisfy you beyond a reasonable doubt, it is good testimony, and sufficient to support a verdict'; 11. Because his honor erred in charging the jury as follows: 'It has also been suggested that I charge you that the circumstantial evidence must be consistent with the guilt of the defendants, and inconsistent with any other reasonable hypothesis. Of course, that is established law, and that is a question which a jury must determine for itself.' The defendants imputing error to so much of this as remits a question of law to the jury, and leaving the jury to abide by the rule or not at discretion."

J. G. McCants and Ragsdale & Ragsdale, for the appellants.

Hough, for the state.

267 McIVER, C. J. The defendants were charged in the same indictment—Jasper Atkinson as principal, and John Atkinson as accessory before the fact—with the murder of one John H. Clamp, and the case came on for trial before his honor, Judge Wallace, and a jury. It is stated in the "case" as prepared for argument here that: "The defendants, through their counsel, at the proper time, before the jury was sworn, and before pleading to the indictment, entered a demurrer thereto, and moved to quash the same upon the following grounds: 1. That as to the defendant Jasper Atkinson, the indictment does not conclude, 'against the peace and dignity of the state'; 2. As to the defendant John Atkinson, that the indictment does not state facts sufficient to constitute the offense, inasmuch as it does not fully, fairly, and formally describe the offense with which he is charged." Pending the hearing and consideration of this motion the defendants were remanded to the jail; and, when the hearing and consideration of the motion was concluded, his honor directed that the prisoners be brought into court, and thereupon announced that the motion be overruled, and that the trial should proceed.

During the progress of the trial testimony was introduced, on the part of the state, tending to show that tracks were found at the scene of the homicide, and going in the direction of the house at which the defendants were staying on the night when the deceased was shot and killed, which tracks witnesses undertook to identify as the tracks of the

defendant Jasper Atkinson, by reason of the fact that when he placed his foot in one of the tracks it fitted the same. But when it was made to appear that this defendant had been required by the officer in charge to put his foot in the tracks discovered, and to make other tracks by running, which could be compared with the others originally found, the circuit judge, on the motion of defendants' counsel, ordered the testimony as to the tracks obtained by compulsion to be stricken out, adding these words: ³⁶⁸ "I will say to the jury now that no defendant can be compelled to make evidence against himself, just as he cannot be compelled to testify as to his guilt. If the defendant did any thing voluntarily, that is competent." Testimony was also offered on the part of the state tending to show that certain pieces of paper, parts of a newspaper, which were found in the room occupied by the defendant John Atkinson by some of the witnesses, corresponded with the paper picked up at the scene of the homicide supposed, from the stains upon it of blood and brains, to have been the wadding of the gun with which the fatal shot was fired, inasmuch as the printing on these papers indicated that they were taken from the same newspaper article. After much other testimony, which need not be adverted to here, and after hearing the argument of counsel and the charge of the judge, the case was submitted to the jury, who found both of the defendants guilty, and the defendants appealed, upon the several grounds set out in the record, which need not be stated *in totidem verbis*, but which should be so set out in the report of this case.

The first exception raises the question whether there was error in depriving the defendants of the alleged right to be present at the hearing of the motion to quash the indictment. The right of the accused to be present during every stage of his trial for a capital felony has long been settled, and is still fully recognized; but the question here is, whether the motion to quash the indictment constitutes any part of the trial. As it seems to us, this motion is intended to test the question whether the defendants should be put upon their trial; for there can be no trial, in the legal sense of the term, until a valid indictment is presented (*State v. Ray*, Rice, 1; 33 Am. Dec. 90), and hence the hearing of this motion cannot be regarded as any part of the trial, but rather a preliminary inquiry as to whether there should be a trial. Indeed, it cannot properly be said that a trial is commenced until the jury

was decided more than half a century ago, and that decision has been steadily adhered to since"—citing numerous cases. Nor can it be said that the fourteenth amendment has the effect of extending the operation of the fourth and fifth amendments to the states. For, as was held in *Minor v. Happersett*, 21 Wall. 171: "The amendment (speaking of the fourteenth) did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." And the same doctrine was held in the *United States v. Cruikshank*, 92 U. S. 542. Besides, the same rights which are guaranteed by the fourth and fifth amendments to the constitution of the United States are expressly declared by sections 13 and 22 of article 1 of the state constitution; for, in the former section the declaration is that no person shall "be compelled to accuse or furnish evidence against himself," while the language in section 22 is: "All persons have a right to be secure from unreasonable searches or seizures of their persons, houses, papers, or possessions."

The question now presented for our decision is not whether the persons who found the pieces of paper in the room of the defendant John Atkinson violated any of his legal rights by entering his room without authority, but whether the papers there found could be offered in evidence in this case. For, while it may be possible that it was a technical trespass to enter his room without authority, yet it does not by any means follow that the pieces of paper there found could not be offered in evidence. For, as is said in 1 Greenleaf on Evidence, section 254 a: "It may be mentioned in this place, that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." There was nothing in the evidence tending to show that the defendants, or either of them, was compelled to furnish these papers, or that they were even asked to do so. ³⁷³ Indeed, it seems that neither of the defendants were present, or even knew that the papers were found in the room when they were found; and there can, therefore, be no pretense that the defendants were compelled to furnish these papers as evidence against them.

The case of *Boyd v. United States*, 116 U. S. 616, relied on by appellants, was a case in which the court was called upon to determine the validity of an order issued by the United States circuit court, requiring the defendant to produce before the court his books and papers, to be used in evidence against him on the trial of a criminal case, and the court held that the circuit court had no power to issue such an order, as it was equivalent to an order compelling the defendant to testify against himself, in violation of the provisions of the fifth amendment of the constitution of the United States. This case, therefore, while very interesting, as furnishing an able and elaborate discussion of the right of exemption from unreasonable searches and seizures, has no application to the present inquiry. We are of opinion that the sixth exception cannot be sustained.

The seventh exception is too general to warrant any consideration at our hands.

The eighth and ninth exceptions, complaining, as they do, of the reception of evidence obtained by compelling the defendants to testify against themselves, may be considered together. They must be regarded as only relating to the testimony as to the tracks, which were required by the officer to be made by the defendant, and putting his foot into one of the tracks. But this testimony, as we have seen, having been stricken out by the order of the circuit judge, together with his express direction to the jury that the testimony obtained by compulsion could not be considered by them, leaves these exceptions without any basis to rest upon, and must, therefore, be overruled. While, therefore, we do not propose to consider or decide the point, it may not be amiss to say that we find no little conflict amongst the authorities upon the subject, as may be seen by reference to the following cases: *State v. Garrett*, 71 N. C. 85; 17 Am. Rep. 1; *State v. Graham*, 74 N. C. 646; 21 Am. Rep. 493; ²⁷³ *Stokes v. State*, 5 Baxt. 619; 30 Am. Rep. 72; *Walker v. State*, 7 Tex. Ct. App. 245; 32 Am. Rep. 595; *State v. Ah Chuey*, 14 Nev. 79; 33 Am. Rep. 530; *Blackwell v. State*, 67 Ga. 76; 44 Am. Rep. 717.

The tenth exception imputes error to the circuit judge, in charging upon the facts. But we think this is an entire misconception of the charge. The quotation relied upon to sustain this exception plainly means that circumstantial evidence is quite sufficient to support a verdict, if the jury be-

lieve, beyond a reasonable doubt, from such evidence, that the accused is guilty. The circuit judge clearly did not express or even intimate any opinion whatever as to the force and effect of the circumstantial evidence relied upon, but left that to the jury.

The eleventh exception was not urged in the argument, but, as it was not abandoned, it becomes necessary for us to consider it. We are unable to perceive how it can be said, with any propriety, that any question of law was left to the jury, and hence there is no foundation for this exception.

The judgment of this court is, that the judgment of the circuit court be affirmed; and that the case be remanded to that court for the purpose of having a new day assigned for the execution of the sentence heretofore imposed.

TRIAL—RIGHT OF ACCUSED TO BE PRESENT.—A prisoner in capital cases has the right to be, and must be personally, present at all times during the course of his trial, when any thing is said or done affecting him as to the charge against him in any material respect: *State v. Kelly*, 97 N. C. 404; 2 Am. St. Rep. 299, and note. See the note to *French v. State*, 39 Am. St. Rep. 860, and the extended notes to *Warren v. State*, 68 Am. Dec. 219, and *Fight v. State*, 28 Am. Dec. 629.

CRIMINAL LAW—EVIDENCE—PAPER FOUND ON PRISONER.—A man and his wife being arrested for murder, there was found in his pocket-book a paper with the following words in his handwriting: "Do you think it safe to kill them and wrap them up in the clothes, and tell them they went off in a buggy." It was held that this was competent evidence against him, the proof tending to show that he acted on the suggestion contained therein: *State v. Stair*, 87 Mo. 268; 56 Am. Rep. 449.

APPEAL—STRIKING OUT INADMISSIBLE EVIDENCE—EFFECT.—If a court instructs a jury to disregard evidence which had been received against objection and exception, the exception is thereby vitiated, and the error in admitting the evidence is no longer available on appeal: *Alabama etc. R. R. Co. v. Frazier*, 93 Ala. 45; 30 Am. St. Rep. 28. The effect of withdrawing evidence erroneously admitted, and which may have been prejudicial in its nature, is to cure the error, unless such evidence is of such a prejudicial nature as to so influence the jury against the defendant that he would be deprived of a fair trial: *Miller v. State*, 31 Tex. Cr. Rep. 609; 37 Am. St. Rep. 836.

CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY OF.—To justify a conviction of crime on circumstantial evidence alone it must be inconsistent with any reasonable theory of innocence: *State v. Clifford*, 86 Iowa, 550; 41 Am. St. Rep. 518. Absolute certainty is not essential to proof by circumstances, and, if they produce moral certainty to the exclusion of every reasonable doubt, it is sufficient: *Carlton v. People*, 150 Ill. 181; 41 Am. St. Rep. 346, and note, with the cases collected.

AMENDMENTS TO FEDERAL CONSTITUTION.—Amendments to the federal constitution adopted at the first session of Congress are restrictions upon the powers of the general government only, and not upon those of the states:

Livingston v. Mayor, 8 Wend. 85; 22 Am. Dec. 622. Article 4 of the amendments to the constitution of the United States has no application to proceedings under the authority of a state: *Reed v. Rice*, 2 J. J. Marsh. 44; 19 Am. Dec. 122. Article 6 of the amendments to the federal constitution establishes a limitation to the mode of trial in the federal courts, but not in the state courts: *State v. Keyes*, 8 Vt. 57; 30 Am. Dec. 450, and note. See, also, the note to *State v. Goodwill*, 25 Am. St. Rep. 871.

MASON v. COUNTY OF SPARTANBURG.

[40 SOUTH CAROLINA, 390.]

PROXIMATE CAUSE.—A hole under the end of a bridge does not render a county liable for injury received by the driver of a buggy, when his horse, becoming frightened after stepping with his forefeet upon the bridge, backs and turns the buggy over, thus throwing the driver violently down an embankment, in the absence of any evidence, except the opinion of the party injured, that the fright of the horse was caused by the hole under the bridge.

Duncan & Sanders, for the appellant.

Bomar & Simpson, for the appellee.

391 **McGOWAN, J.** This was an action against the county of Spartanburg for damages on account of personal injuries alleged to have been sustained through defects in the repair of a highway of the said county. The complaint, among other things, alleged that in the month of February, 1892, the plaintiff was in his buggy, driving over and along a certain highway of the county of Spartanburg, where it approaches Ferguson's creek at or near its mouth, intending to cross said creek over a causeway and bridge, when, owing to the defects and want of repair, and improper construction of the highway, abutments of the bridge, and the bridge itself, the animal he was driving "became a little frightened," as plaintiff believes, at a large hole, which had been allowed to appear in and across said highway, extending almost the whole breadth of said highway, just where the timbers of the bridge rest on the embankment, and a portion of the said causeway and abutments of said bridge, consisting of dirt, timbers, and rock, gave way, and the plaintiff and his buggy, along with said dirt, rocks, and timbers, were thrown violently down the said embankment, thereby breaking his leg, and otherwise wounding and bruising him, causing great mental and physical pain, and disabling 392 him, to his dam-

age in the sum of three thousand five hundred dollars, etc. The defendant county answered: 1. Denying each and every material allegation of the complaint; 2. Alleging that whatever injuries the plaintiff received, at the time and place stated in the complaint, were caused by, and the result of, his own carelessness and negligence; and the defendant was in no way responsible therefor.

The cause came on for trial before his honor, Judge Wallace, and a jury. The plaintiff offered his testimony, which is all in the brief, and, when he rested, the defendant company moved for a nonsuit, on the ground that there was no evidence tending to prove that the plaintiff had been injured through a defect in the highway, causeway, or bridge, but that the injury was caused by his horse becoming frightened, which motion, after argument, was granted; and the plaintiff now appeals to this court to reverse the order of nonsuit upon the following grounds: 1. That his honor erred in holding that there was no evidence tending to show that the injuries complained of were caused by a defect in the repair of the highway, causeway, or bridge; 2. In not submitting the case to the jury and allowing them to say whether or not the injuries complained of were caused by a defect in the repair of the highway, causeway, or bridge; 3. In ruling and holding that there was no evidence of the facts alleged in the complaint for the jury to pass upon; 4. In granting the motion for a nonsuit, after evidence had been introduced tending to prove that the plaintiff had received bodily injury through a defect in the abutment or causeway and the bridge," etc.

The exceptions may be considered together, as they all, in different forms, make the same question, whether there was any evidence tending to show injury to the plaintiff, through a defect in the repair of the highway or bridge, which the presiding judge should have submitted to the jury. There certainly was evidence that the plaintiff received injury, and that it was caused by the backing and suddenly turning of the horse; that, in order, was caused by the fright of the horse, and it is only the opinion of Mr. Mason that the fright was caused by the hole under the bridge, after the forefeet ³⁹³ of the animal were on the bridge. In what respect was that a defect, and how did it cause the injury? Upon this point we have examined the evidence closely, and we think that the testimony of both Mr. Mason and his wife

(who was in the buggy with him) show that the injury was not received through the hole under the end of the bridge, but from the fright of the horse. The plaintiff testified that Mrs. Mason was in the buggy with him. "They had a bridge to cross over Ferguson's creek. They were driving along and came to the bridge. My horse stepped his forefeet on the bridge; there was a hole under the bridge, where it struck the abutment. My horse shied and turned entirely; as she wheeled and turned, threw me over the abutment, and as I fell the rock and several timbers that were rotten fell, and my leg was broken, and I was nearly killed." Mrs. Mason testified that "she [the animal to the buggy] was a new horse, and I had not been riding behind her; our other horse I could drive myself. I did not object [to going over the bridge], but I asked Mr. Mason if he was not going to lead over. I was run off a bridge once before, and after that I always wanted some one to lead over," etc. We see no error in the order for nonsuit: See *Acker v. Anderson County*, 20 S. C. 498, and *Brown v. Laurens County*, 38 S. C. 282.

The judgment of this court is, that the judgment of the circuit court be affirmed.

PROXIMATE CAUSE—DEFECT IN HIGHWAY—FRIGHTENING HORSES.—The negligence of a township in failing to keep one of its bridges in repair is the proximate cause of injuries received by a traveler in attempting to control the struggles of his horse after it has caught its feet in a hole in such bridge: *La Duke v. Township of Exeter*, 97 Mich. 450; 37 Am. St. Rep. 357. See, also, the extended notes to *Morse v. Town of Richmond*, 98 Am. Dec. 611, and *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 832, 836.

GIVENS v. CARROLL.

[40 SOUTH CAROLINA, 413.]

SUBROGATION UNDER VOID SALES.—If a sale under a power in a mortgage with general warranty is subsequently declared void for any irregularity, a purchaser who has paid the purchase money may be subrogated to the rights of the mortgagee under the mortgage, which is regarded as assigned to him, and a subsequent purchaser under a partition sale of the land as the property of the purchaser at the mortgage sale is subrogated to all his rights.

SUBROGATION UNDER VOID SALE—EXTENT OF.—A purchaser of land at a void sale under a power contained in a mortgage is subrogated to the rights of the mortgagee only to the extent of his claim against the land for the amount of purchase money paid by him, and a subsequent purchase under a partition sale of the land as the property of the pur-

chaser at the mortgage sale is only subrogated to the rights and equities of the latter, although he paid a larger sum.

SUBROGATION UNDER VOID SALE—ACCOUNTING—INTEREST—RENTS.—On an accounting between a mortgagor or his heirs and a purchaser at a void sale, under a power contained in the mortgage, or one who claims under him and has been in possession of the land for a number of years, the latter is entitled to recover the purchase money, paid under such sale, with interest added thereto annually, together with the amount expended for improvements and taxes, less the amount due for the rent of the land, deducted annually from such principal and interest.

Patterson & Holman and B. T. Rice, for the appellants.

L. T. Izlar and S. G. Mayfield, for the appellee.

⁴¹⁴ **POPE, J.** On the sixteenth day of February, 1878, one W. R. Lard executed a mortgage of a plantation of land in Barnwell county in this state, containing 255 acres, to secure a debt of \$1,000, to one Allen J. Weathersbee. The said Lard died in November, 1879, survived by the plaintiffs as his only heirs at law and next of kin. In January, 1880, Allen J. Weathersbee, claiming to act under a power of attorney embodied in the mortgage, sold such lands at public sale, and at the price of \$700 conveyed said lands to one W. D. Birt as the highest bidder. Subsequently, W. D. Birt died in the year 1883. All his heirs at law united in an action of partition, under which such tract of land was sold and conveyed by the master for Barnwell county to the defendant, E. D. Carroll, at the price of \$1,025. The plaintiffs, as the heirs at law of said W. R. Lard, deceased, brought action to recover said lands from the defendant, as well as rents and profits. The defendant contested their right to recover, interposing for his protection ⁴¹⁵ his subrogation to all the rights of Allen J. Weathersbee under the mortgage of W. R. Lard to him (Weathersbee).

The matters came on to be heard before his honor, Judge Fraser, at the spring term of the court of common pleas for Barnwell, on an agreed state of facts and exceptions to the report of the master, Patterson. The decree of the circuit judge sustains the right of defendant, Carroll, to be subrogated to all the rights of Allen J. Weathersbee under his mortgage for \$1,000; that the plaintiffs were entitled to recover the rents and profits from the year 1880, which were fixed at the sum of \$877, but required interest to be paid on the mortgage debt of \$1,000 from the 5th of January, 1880, to date of decree, with an allowance for improvements and

taxes for \$173.35. These items allowed the defendant aggregated \$2,094.24, from which he deducted \$877, before referred to, thus leaving the land liable when sold to pay defendant \$1,217.24. The land was ordered to be sold. The plaintiffs contend that such decree was erroneous, and should be reversed on four grounds, which we will now notice, but not in their order.

1. "Because his honor erred in holding that the sale of the land, mentioned and described in the complaint herein, by the mortgagee, Allen J. Weathersbee, and the conveyance by him to W. D. Birt, and the sale of the land by the master in a partition among the heirs of the said Birt, and the purchase of the same at the said sale by the defendant, Carroll, operated as a transfer of the Weathersbee mortgage to the said Carroll." We have been unable to agree with the appellant in this proposition, and will now give our reasons therefor. It may be proper to observe at the outset that the parties to this contention recognized the fact that under the decisions of this court the sale of the lands attempted to be made by Allen J. Weathersbee to W. D. Birt was void for two reasons: 1. Because the power of sale contained in the mortgage of Lard was revoked by the death of said Lard (*Johnson v. Johnson*, 27 S. C. 309; 13 Am. St. Rep. 636); and 2. The deed executed by Weathersbee, the donee of the power, was executed in the name of the donee, and not in that of his principal: *Webster v. Brown*, 2 S. C. 429; *De Walt v. Kinard*, 19 S. C. 292; *Dendy v. Waite*, 36 S. C. 569.

Let us now resume the consideration of this ground of appeal. The intention of Weathersbee in his attempt to sell the lands in question on the 5th of January, 1880, was to obtain the payment of his mortgage, and when, in furtherance of this intention he received \$700 in cash from Birt, it was intended by him in law and in fact to part with his whole interest in his mortgage, so far as the same was a lien upon this tract of land. That his deed did not operate to convey a legal title to said land was Birt's misfortune, but that deed certainly operated to assign in equity such mortgage to Birt, so far as such land was concerned. In Lard's mortgage to Weathersbee there is a general warranty extending to Weathersbee, his heirs and assigns forever. Such a covenant extended to Birt. Mr. Jones, in his work on Mortgages, volume 2, at section 1902, says: "If the sale under the power is subsequently declared void for any irregularity a

purchaser who has paid the purchase money is subrogated to the rights of the mortgagee under the mortgage which is regarded as assigned to him." This doctrine has been fully recognized and enforced by this court: *Stoney v. Shultz*, 1 Hill Eq. 465; 27 Am. Dec. 429; *Bredenberg v. Landrum*, 32 S. C. 215.

But it is contended by the appellants that however true this may be as to Birt, yet that the defendant, Carroll, purchased at a judicial sale in an action by Birt's heirs at law, and that he only holds the deed of the master, which is confessedly without warranty. While all this is true, it must be remembered that the defendant, Carroll, as the purchaser at such judicial sale, became invested with all the rights and equities touching this land that were owned at the time of its sale by the heirs of Birt. A very interesting statement of the law in this state on this matter is embodied in the opinion of the present chief justice in the case of *Lowrance v. Robertson*, 10 S. C. 31, where he said: "Now, by what alone do these plaintiffs" (Lowrance had bought at a sale made by the clerk of court for partition among Pearse's heirs at law) "bring this action? Certainly, as the assignees of Pearse; for though the deed was not made directly to them by Pearse, yet Miller, as ⁴¹⁷ the clerk, under the order of the court conveyed to the plaintiffs all the right, title, interest, and estate of Pearse, including the right of action on Caldwell's covenant, upon its breach, as fully and completely as if Pearse himself had conveyed directly to the plaintiffs. This was distinctly decided in the case of *McCrady v. Brisbane*, 1 Nott & McC. 104, 9 Am. Dec. 676, as to a purchaser at sheriff's sale, and the doctrine has been repeatedly recognized since, down to the case of *McKnight v. Gordon*, 13 Rich. Eq. 222; 94 Am. Dec. 164. And if this be true as to purchasers at an involuntary sale made by the sheriff under execution, how much more true it would be as to a purchaser at a sale made by the proper officer under an order of the court for partition, or some other purpose necessary to the settlement of an estate where all the parties in interest are before the court." It follows, therefore, that this difference here suggested does not alter the *status* of this defendant, Carroll, as to this mortgage.

We will next consider the exception numbered by the appellant as third: "Because his honor should have held, admitting that the doctrine of subrogation could and did apply in Carroll's favor, that he could only hold and enforce

the mortgage to the extent of \$700 the amount paid by Birt at the illegal sale made by the said Allen J. Weathersbee, as the said Carroll claimed immediately under the said Birt." We think this exception should be sustained. When Birt paid Weathersbee \$700 he thought he was purchasing the land in question at that price as its value. Such price so paid was not an extinguishment of the debt due Weathersbee by Lard, but only such portion of the debt as was secured by the land pledged to secure the debt. Equity would only subrogate Birt to such a proportion of the debt as was secured by the mortgage. The sale ascertained the portion of the debt so secured by the mortgage. This view does not, when well considered, impeach the correctness of the rule laid down by this court in the cases of *Lowrance v. Robertson*, 10 S. C. 31, or *Bredenberg v. Landrum*, 32 S. C. 215. In the first-cited case the inquiry was confined to the construction of the statute of this state fixing a rule for damages for breach of a covenant arising under a general warranty, where a vendee ⁴¹⁸ had been evicted by title paramount; and the court there decided that the words of the statute, "In any action or suit for reimbursement or damage, upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of alienation, with legal interest," should be applied to the alienation by Caldwell to Pearse, and not that of Miller, as clerk to Lowrance. Caldwell had received \$5,000 as the purchase money from Pearse, while Miller, as clerk, had only received \$4,000 from Lowrance, because it was Caldwell's contract that was being enforced, and any liability of his executor, Robertson, only existed by reason of Caldwell's contract. In its last analysis it seems to us this cited case tends to sustain the view we here suggest and maintain. For it is Weathersbee's contract with Birt which connects Carroll with this mortgage, and in that view \$700 was the portion of the debt as secured by this mortgage that was assigned by operation of law by Weathersbee to Birt, and through Birt's heirs to Carroll.

In the case of *Bredenberg v. Landrum*, 32 S. C. 215, it is true this court did hold that "where a party at the instance of the mortgagor advances less than the mortgage in the purchase of a mortgage, judgment creditors of the mortgagor cannot object to the recovery of the full original debt by the assignee," but this was in a case where all the mortgagees had expressly assigned in writing all their interests in the

mortgage to Landrum, and where Landrum had only paid \$3,000 for a \$4,000 mortgage. This court only recognized in that case the right of persons under no disabilities to contract for the sale of their own property at their own price, and denied to strangers any right to question such conduct when it was confessedly *bona fides*. In the case at bar we are called upon to enforce an equity growing out of a contract, and for which equity the parties themselves made no direct provision. Under such circumstances it seems to us that such equity should be confined and made operative within the limits of the transaction of the parties to it.

The second exception seems well taken. Its language is: "Because his honor erred in holding that the plaintiffs were not entitled to interest on the rents of said land as the same accrued; whereas, it is submitted that his honor ⁴¹⁹ should have held that the rents should have been applied in the accounting annually to the satisfaction and discharge of the mortgage debt, and that he should have overruled the master's report in this respect." We do not mean to sustain the exception in the form in which it is presented. The underlying idea embodied in the exception amounts to this: If A is indebted to B by an obligation bearing interest, and B at the same time such indebtedness subsists is indebted to A for sums of money that accrue and become payable at the beginning of each year, when an account is taken in chancery of such mutual indebtedness, if the sums of money due by B to A exceed the interest due on the contract of A to B, this excess should be applied to the extinguishment of interest, and thereafter to the principal, as far as it will do so. Take this as an illustration of our views: If A owes B a debt of \$700, evidenced by a note wherein interest is fixed at seven per cent, at the end of the first year A owes B on such debt \$749. But suppose, when the debt is contracted, B is in possession of a tract of land belonging to A, whose rental value is \$50 for that first year, and for any cause this mutual indebtedness is carried into chancery, will not A be held to have his debt due to B of \$749 reduced by the \$50 due by B to A for rent? Would not the same principle be applied if the debt had run at interest for several years, on the one hand, and the indebtedness for rent had run on for a corresponding period? This would be so, not because the rent bears interest—the payment of interest is a matter of contract—but because in equity such mutual indebtedness, ac-

cruing and maturing at stated intervals, is subject to such a rule.

Now, in the case at bar, on the first day of January, 1880, the heirs at law owed, so far as the assets of their ancestor descended to them would pay, to Carroll, the defendant, the sum of \$700, at seven per cent interest, and, therefore, this indebtedness on the 1st of January, 1881, amounted to \$749. But, on the other hand, Carroll owed these heirs at law, on the 1st of January, 1881, the sum of \$50 for the rent of their lands. The true amount of this indebtedness on the 1st of January, 1881, was the \$749, less the rent of \$50, to wit: \$699. This last amount of \$699, with interest, amounted, on the 1st of January, 1882, to ⁴²⁰ \$747.93, but Carroll owed the heirs rent on that day \$50. The true amount due by plaintiffs to Carroll, on the 1st of January, 1882, was \$697.93. Plaintiffs owed Carroll, on 1st of January, 1883, \$746.79, less \$50 for rent—really \$696.79. Plaintiffs owed Carroll, on 1st of January, 1884, \$745.57, less \$50 for rent—really \$695.57. Continuing this process to the amounts due by the parties to each other, and governed by the findings of fact from which there is no appeal, down to the 1st of January, 1892, the plaintiffs will be due, as the balance of the mortgage debt due at that date, \$382.55. But at that date the plaintiffs also owed Carroll \$173.35, for improvements and taxes. The whole indebtedness at that date would be \$555.90, and this sum, with interest to 1st of January, 1893, would amount to \$594.81. Applying the rent for 1893, at \$90 per annum, would leave the lands in the heirs' hands liable to pay Carroll \$504. 81. The decree in the circuit court should provide that if the heirs at law of Lard, the plaintiffs, do pay to the defendant the sum of \$504.81, and the costs of this action, by a day certain to be named in the decree, the lands should be turned over to the plaintiffs, with any rents for the year 1894, but that in the event of their failure to pay these sums, that then the lands in question should be sold, and the proceeds of sale applied to costs and the debt of Carroll, and thereafter such proceeds as remain be paid to the plaintiffs.

The last exception relates to the findings of fact by the circuit judge and master. When scrutinized under the light of the decisions of this court, regulating the same, no error is manifested.

It is the judgment of this court that the judgment of the

circuit court be modified in the particulars herein indicated, and for that purpose that the action be remanded to that court with directions that such modifications be there decreed.

THE case of *Williams v. Washington*, 40 S. C. 457, was an action by Sanders Williams against George Washington, Adeline Williams, Lewis Williams, J. C. Bodie, J. H. Beckman, and James Powell, for the recovery of land, damages, injunction to stay waste, and partition. Caesar Williams and Sanders Williams purchased a tract of land and mortgaged it to J. H. Beckman. After the death of Caesar Williams and the nonpayment of the mortgage debt Beckman sold the land under a power of sale contained in the mortgage to one Nurnberger whose deed was signed by Beckman as mortgagee. This deed was inoperative as such "because executed after the power in the mortgagee to sell had been revoked by the death of Caesar Williams: *Johnson v. Johnson*, 27 S. C. 309; 13 Am. St. Rep. 636; and because the deed was not made in the name of the owners, but was made in the name of the mortgagee: *Webster v. Brown*, 2 S. C. 429; *De Walt v. Kinard*, 19 S. C. 286; *Dendy v. Waite*, 36 S. C. 569. While this deed from Beckman as mortgagee could not operate as a deed, yet it did operate as an assignment of the mortgage held by Beckman to Nurnberger: 2 Jones on Mortgages, sec. 1902; *Stoney v. Shultz*, 1 Hill Ch. 465; 27 Am. Dec. 429; *Givins v. Carroll*, 40 S. C. 413; *ante*, p. 889." Nurnberger divided the land equally by survey, conveying one-half to Beckman, and the other half to J. N. Wigfall, who conveyed to C. K. Henderson, who conveyed to James Powell, who conveyed to George Washington. Each of the purchasers subsequent to Nurnberger supposed that he was acquiring title in fee to the land, but the court decided that they actually in succession only became invested with the ownership of one-half of the mortgage debt, and held as assignees of such interest, and although each purchaser was induced in turn by the surviving mortgagor to purchase his moiety for his benefit, and treated him as their debtor, yet they have no grounds to claim that the mortgagor is estopped from claiming title to his portion of the land upon paying the mortgage debt. The next to the last purchaser, Powell, purchased the land at the request of Sanders Williams, the surviving mortgagor, and took his note, payable at sixty days, for the purchase price. Soon after the maturity of the note Powell conveyed the land to Washington, and then induced Williams, who was illiterate, to consent to the sale and conveyance, with the right to repurchase a portion of the land. This was decided to be a fraud on Williams, and not an estoppel against him, and in favor of the last two purchasers. It was also decided that such mortgagor was entitled to have the deeds to the land and the mortgage canceled upon payment of the amount due on the mortgage debt so far as it affected this land. This amount to be paid without interest, as he had made tender of the debt and interest, which was refused.

RIGHT OF PURCHASER AT INVALID JUDICIAL SALE TO SUBROGATION AND TO RETAIN POSSESSION UNTIL REPAID THE AMOUNT OF HIS BID: See *Valle v. Fleming*, 29 Mo. 152; 77 Am. Dec. 557, and note; *Perry v. Adams*, 98 N. C. 167; 2 Am. St. Rep. 326, and note; *Huse v. Den*, 85 Cal. 390; 20 Am. St. Rep. 232; *Bond v. Montgomery*, 56 Ark. 563; 35 Am. St. Rep. 119.

RIGHT TO SUBROGATION OF PURCHASE UNDER VOID FORECLOSURE SALE: See note to *Perry v. Adams*, 2 Am. St. Rep. 330.

VOID EXECUTOR'S SALE—IMPROVEMENTS.—In an action to recover land from the purchaser at a void executor's sale no allowance can be made, under the California statute, for improvements except as an offset for damages claimed for withholding the possession: *Huse v. Den*, 85 Cal. 390; 20 Am. St. Rep. 232.

SINGER MANUFACTURING COMPANY v. SMITH.

[40 SOUTH CAROLINA, 529.]

CHATTEL MORTGAGE—LEASE, WHEN IS.—A written instrument purporting to be a lease of personal property of a certain value, by which the lessee agrees to pay a certain rental per month for a certain time, and, on default in the payment of rent, to return the property to the lessor, is a chattel mortgage and not a lease.

MORTGAGE OR CONDITIONAL SALE.—If it is doubtful from the face of a written instrument whether a conditional sale or a mortgage is intended the courts generally treat it as a mortgage.

CHATTEL MORTGAGES—ACTION TO RECOVER POSSESSION—DEFENSE.—In an action by a mortgagee to recover possession after condition broken in a chattel mortgage the mortgagor is not entitled to set up a counter-claim for breach of warranty as a defense.

Woods & Spain, for the appellant.

529 McGOWAN, J. The circuit judge who heard this case states that the action was brought in the court of trial justice, to recover the possession of a sewing-machine, alleged to be the property of the plaintiff, and wrongfully withheld or 530 detained by the defendant after demand. The trial was had before the trial justice without a jury, upon the following instrument, viz:

“LEASE.

“This certifies that I, Raiford Smith, now residing in the town of Darlington, state of South Carolina, have received of the Singer Manufacturing Company one Singer sewing-machine [describing it], with apparatus belonging thereto, all in good order, and valued at fifty-five dollars, which I am to use with care, and keep in like good order, and for the use of which I agree to pay as follows: ten dollars on the delivery of this agreement, the receipt whereof is hereby acknowledged and accepted as payment for the rent of the first month only, and then at the rate of three dollars per month, payable in advance, on the 22d day of each month hereafter for fifteen months, at its agency in Darlington, S. C., without notice or demand. But if default shall be made in either of said payments, or if I shall sell or offer to sell, re-

move or attempt to remove, the said machine from my aforesaid residence, without the written consent of the said company, then and in that case I agree to return the same, and that it or its agent may renew actual possession thereof; and I hereby authorize and empower the said company or its agent to enter the premises wherever said machine may be, and take and carry the same away, hereby waiving any action for trespass or damages therefor, and disclaiming any right of resistance thereto; and also waive all right of homestead and other exemptions, under the laws of the state, as against this obligation.

“Witness my hand and seal, this February 22, 1890.

[SIGNED] “RAIFORD SMITH. [L. s.]

“Attest: George F. Rogers.

“Notice to parties signing this lease: Read the terms of this lease before signing it, as no statement or agreement or understanding, verbal or written, not contained herein will be recognized by us.

[SIGNED] “THE SINGER MANUFACTURING COMPANY.”

The defendant answered orally in the trial justice court: 1. “That defendant bought machine, which was guaranteed; that defendant has already paid on the machine thirty-two dollars and fifty cents, which is more than it is worth; that it is an old second-hand machine; 2. That although the paper sued on is claimed to be a lease, ⁵³¹ yet in law it is only a chattel mortgage given to secure this debt, and that, even if it should be held to be a conditional sale, and the title remain in the lender, defendant cannot be held to deliver up the property if it is not as represented, until the vendor puts him in possession of the money already paid.”

Testimony was admitted, over objections, tending to show that the machine was warranted, and the warranty was broken, the machine being, as alleged, an old “second-hand instrument,” not worth the money already paid for it. The trial justice held that the title to the property was in the plaintiff company, and gave judgment for the delivery of it to them, without any regard to the payments which had been made. The defendant appealed to the circuit court, and his honor, Judge Izlar, held that the “instrument sued on was one of sale and not of hiring, and that it was in effect a chattel mortgage. That while the contract is in some respects very similar to that set out in the case of *Ludden etc. Music*

House v. Dusenbury, 27 S. C. 464, there is a marked difference between the two instruments. . . . The intention of the contracting parties in the case named could only be discovered from the words used in the contract, while the testimony in the present case stamps the transaction as a sale, and not as a lease or hiring. . . . The instrument under consideration was evidently given to secure the purchase price of the sewing-machine. It is settled law that, if a security for money is intended, that security is a mortgage, though it may not bear upon its face the form of a mortgage. Conditional sales are not favored in law, and where it is doubtful from the face of the instrument whether the contract is a conditional sale or a mortgage, the courts generally treat it as a mortgage, for the reason that such construction will be most apt to attain the ends of justice, and prevent fraud and oppression. The rights and remedies of a mortgagor are widely different from those of a lessee of a chattel. While the mortgagee of a chattel, after the condition of the mortgage is broken, becomes the legal owner of the chattel mortgaged, and can maintain an action to recover its possession, the mortgagor before foreclosure by sale may bring an action to redeem the mortgaged property, or, in case of foreclosure by ⁵³² sale, an action against the mortgagee to account for any surplus proceeds of the sale which may remain after satisfying the mortgage debt," etc. And the judge sustained the appeal, reversed the judgment of the trial justice, and remanded the case for a new trial. From this judgment the plaintiff appeals to this court upon the following grounds: 1. "Because his honor should have held that the paper signed by the defendant, and upon which this action was brought, was a lease of personal property, and that he erred in not so holding; 2. That his honor erred in holding that said paper was an instrument in the nature of a mortgage, and the same was not a lease of personal property; 3. That even if his honor was correct in holding that the paper in question was a chattel mortgage, the plaintiff was entitled to recover the property in question, the condition of the mortgage being broken, and that his honor erred in not so holding; 4. That his honor committed error in holding that, because the mortgagor, before foreclosure by sale, may bring an action to redeem the mortgaged property, or, in case of foreclosure by sale, an action against the mortgagee to account for any surplus proceeds of the sale which might remain after satisfying

the mortgage debt, the plaintiff in this action could not recover possession of the sewing-machine in question," etc.

It is difficult for one to sell and deliver property, and at the same time to remain the owner of it. After careful consideration I feel constrained to concur with his honor, Judge Islar, that the contract between these parties was not a lease, but substantially a sale of the machine for fifty-five dollars—ten dollars paid in cash, and the remaining forty-five dollars to be paid in fifteen small installments of three dollars each per month, making in the aggregate the precise sum of fifty-five dollars, the price of the machine. We think that a lease is generally executed by the owner of the property; this paper was signed by the person negotiating for a purchase of the article. The defendant could not secure the credit portion of the purchase money until some interest was conveyed to him by the company.

But to this it is answered, that the condition of the mortgage having been broken, the plaintiff had the legal title to the property, ⁵³³ and had the absolute right to recover it, whether the contract was a lease or in the nature of a mortgage; and that in such action a counterclaim for breach of warranty as to the property could not be set up as a defense. It seems that the precise point was decided in the case of *Talbott v. Padgett*, 30 S. C. 167, in which it was held as follows: "In action to recover possession after condition broken in a chattel mortgage or conditional sale, defendant interposed as a defense that he was entitled to an accounting for the amount due, and to have the property sold and the surplus paid to him. Held, on oral demurrer by the plaintiff, that these matters could not defeat the plaintiff's recovery, and, besides, were not facts, but legal conclusions. Defendant further alleged, by way of counterclaim, that plaintiff had failed to perform his covenants in the agreement sued on, and demanded damages. Held, that the defense was not only insufficiently pleaded, but could not be interposed as a counterclaim to an action in claim and delivery," etc. This would seem to be conclusive, and that the defendant's rights, whatever they may be, are equitable in character.

The judgment of this court is, that the judgment of the circuit court be reversed, and the judgment of the trial justice affirmed.

CHATTEL MORTGAGES—LEASE.—A lien for rent created by lease, and claimed on property left in the possession of the tenant, is in the nature of

a mortgage rather than of a pledge, and is governed by the rules of law applicable to chattel mortgages: *Borden v. Crook*, 131 Ill. 68; 19 Am. St. Rep. 23. A lease executed and recorded as required by the law relating to chattel mortgages, providing that the "rents, whether due or to become due, shall be a perpetual lien on any and all goods, merchandise, furniture, and fixtures now contained, or which may at any time during the continuance be contained, in the building, except such goods as may be sold during the course of retail trade" must be treated as a chattel mortgage: *Greeley v. Winsor*, 1 S. Dak. 117; 36 Am. St. Rep. 720, and note. See, also, the note to *Almand v. Scott*, 12 Am. St. Rep. 243.

CHATTEL MORTGAGES, AN AGREEMENT, WHEN IS, OR CONDITIONAL SALE: See *Orompton v. Beach*, 62 Conn. 25; 36 Am. St. Rep. 323, and note, with the cases collected.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE

PULLMAN PALACE CAR COMPANY v. GAVIN.

[98 TENNESSEE, 82.]

SLEEPING-CAR CORPORATIONS ARE NOT ANSWERABLE AS INNKEEPERS for the loss or theft of articles from their cars.

SLEEPING-CAR CORPORATIONS OWE TO THEIR CUSTOMERS the duty of maintaining a careful and continuous watch over the interior of the car while the berths are occupied by sleepers, and are liable if property of a passenger is stolen in consequence of the failure to maintain such careful and continuous watch.

SLEEPING-CAR CORPORATION IS ANSWERABLE IF ONE OF ITS SERVANTS or agents, charged with the duty of watching and protecting the property of a guest, steals it.

A MASTER BOUND TO DO CERTAIN THINGS AND WHO DEPUTES THE DOING OF THEM TO A SERVANT OR AGENT remains answerable for the manner in which they are done, or omitted to be done.

AN ACTION OF TRESPASS MAY BE MAINTAINED BY ONE HAVING THE EXCLUSIVE POSSESSION of the property at the time of a trespass committed by a stranger having neither title in himself nor authority from the legal owner.

SLEEPING-CAR CORPORATION CANNOT EXCUSE ITSELF FROM LIABILITY FOR MONEY STOLEN from a passenger's berth during the night by one of its porters on the ground that such moneys did not belong to the passenger from whom they were taken, but had been intrusted to him to be kept for the use of a fellow-passenger.

Thomas H. Jackson, for the plaintiff in error.

H. C. Warriner, for the defendant in error.

84 McALISTER, J. The object of this suit is to recover the sum of one hundred and fifty dollars alleged to have been stolen from M. Gavin while a passenger on a Pullman palace-car.

It appears from the record that on the night of the 3d of
(902)

August, 1889, M. Gavin, with his immediate family and a few friends, left Memphis for a summer excursion. Among the party was Miss Kelly; and just before the train started, at 10 o'clock, Mrs. Kelly, the mother of Miss Kelly, who had accompanied her to the cars, handed to Gavin, across the aisle, the sum of one hundred and fifty dollars, to be used in defraying the expenses of her daughter during the trip. Gavin deposited the roll of money, without opening it, in his trousers pocket; and, when he retired to his berth, a lower one, about 11 o'clock, he felt the roll of money in his pocket. He then rolled up his trousers and placed them in the receptacle provided for clothes at the head of his berth. The next morning when Gavin awoke he felt for his trousers, and discovered that they were missing. Robinson, the colored porter, was called, and, in response to inquiries, told Gavin that he had found a pair of trousers on the floor that morning, but, supposing they belonged to the section adjoining the head of Gavin's berth, he had placed them in that section. This section was occupied by two well-known and reputable citizens of Memphis. Robinson then brought the trousers to Gavin, but the money was missing. Gavin also discovered that ⁵⁵ a bunch of keys was missing from his pocket, but he found therein a sleeve or collar button which was not his property. Robinson informed Gavin that the other porter, one Lind, had found a bunch of keys in the aisle during the night. Robinson then brought Lind to Gavin, and Lind handed him the bunch of keys, and also one or more baggage-checks. Gavin, upon discovering the loss of the money, had the conductor called, and reported his loss. The conductor made some search, but failed to find the money.

During the investigation it was reported to Gavin that the porter Lind had lost one of his sleeve-buttons, and this fact, coupled with the finding of a strange sleeve-button in Gavin's trousers pocket, at once fixed suspicion upon Lind. Gavin called Robinson and questioned him about the sleeve-button, and was told by Robinson that Lind had asked him about his lost sleeve-button.

The car containing Gavin's party was occupied entirely by reputable citizens of Memphis, and many were also in the other sleepers. The train was a special train of five sleepers, and was to run from Memphis to Norfolk without change of cars, and all the sleepers were in charge of only one conductor. No new passengers came aboard at any place be-

tween Memphis and Chattanooga. The conductor testified in regard to the feasibility of one passenger robbing another behind the curtain, that it is possible to be done, but not probable, if the porter is on watch and attending to ⁵⁶ his duty. The record shows that Lind went on watch about 12 o'clock, and remained on watch until 3 o'clock, when he was relieved by Robinson, who then continued his watch until 6:30 the same morning.

Robinson testified that, if the porter was at his post and on watch, it would be impossible for any one passing along the aisle, or for a passenger occupying an adjoining berth, to abstract any thing from Gavin's berth without attracting the porter's attention; that such a robbery was impossible without detection when the porter was on watch and doing his duty.

The porter Lind testified that no one passing along the aisle could have stolen any thing from a berth without being seen by him while on watch, but that a passenger in a berth might steal from an adjoining section at the head or foot.

The circuit judge tried the case without the intervention of a jury, and being of opinion that the money was stolen by porter Lind, rendered judgment against the company for one hundred and fifty dollars. The Pullman Palace Car Company appealed, and assigned errors.

The law is well settled that a sleeping-car company is not a common carrier. They differ radically in the kind of service rendered the public. The contract of the sleeping-car company is to lodge the passenger, while that of the carrier is to carry him. Sleeping-car companies are not liable as innkeepers for the loss or theft of articles ⁵⁷ from a guest, for the reason that the passenger on a sleeping-car retains the exclusive personal possession and control of his valuables. The company does not undertake to receive the property of the guest, but expressly declines to do so, and, for this reason, is absolved from the liability of an innkeeper. It has been so difficult to define the precise legal *status* of this class of public servants, and the measure of their accountability, that they have been facetiously characterized as "flying non-descripts." It is, however, universally recognized by the courts that it is the duty of a sleeping-car company to maintain a careful and continuous watch over the interior of the car while the berths are occupied by sleepers. If the property of the passenger is stolen by a fellow-passenger or by an

intruder on the train, in consequence of the failure of the company to maintain this careful and continuous watch, the company will be liable for its value: *Carpenter v. New York etc. R. R. Co.*, 124 N. Y. 58; 21 Am. St. Rep. 644. It follows as a corollary from this proposition that, if the servant or agent of the company, charged with the duty of watching and protecting the property of the guest, purloins it himself, the company is responsible.

Says Mr. Wood, in his work on Master and Servant, section 321: "In that class of cases where the master owes certain duties, either to third persons or the public, whether the same arise from contract or statutory obligations, a different rule of ⁵⁸ liability exists from that which prevails when the liability sounds entirely in tort. When by contract or statute the master is bound to do certain things, if he intrusts the performance of that duty to another he becomes absolutely responsible for the manner in which the duty is performed, precisely the same as though he himself had performed it, and that without any reference to the question whether the servant was authorized to do the particular act. Where the master, by contract or operation of law, is bound to do certain acts he cannot excuse himself from liability upon the ground that he has committed that duty to another, and that he never authorized such person to do the particular act. Being bound to do the act, if he does it by another he is treated as having done it himself, and the fact that his servant or agent acted contrary to his instructions, without his consent, or even fraudulently, will not excuse him": *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654; 15 Am. St. Rep. 873.

The first assignment of error is, viz: "There is no evidence to support the finding of the circuit judge, for the reason that the evidence introduced by the plaintiff shows that the servants of defendant were watchful and diligent, and were guilty of no negligence." The circuit judge found that the larceny was committed during Lind's watch—between 12 and 3 o'clock—and he found, further, that Lind was the guilty party. Upon an examination of the record we find material evidence to sustain the finding of the circuit judge. ⁵⁹ The second assignment is that the circuit judge erred in finding that the defendant, as a matter of law, was liable to the plaintiff for the loss of the money, for the reason that one passenger has no right to carry upon his

person the money of another passenger, and to hold the defendant company liable for the loss.

The third assignment of error will be considered in connection with the second. The third assignment is, viz: "The evidence shows that the money sued for was not the money of M. Gavin, but the money of Martin Kelly, who was not a passenger upon the car."

The *gravamen* of this suit is to recover the value of property claimed to have been stolen by the employees of the company who were charged with the duty of preserving it. As already stated, this money came into the hands of Mr. Gavin as a depositary, to be used and expended by him in defraying the traveling expenses of Miss Kelly. It has been held in this state that an actual and exclusive possession by a party, even though it be by a wrongdoer, is sufficient to support an action of trespass against a mere stranger or wrongdoer, who has neither title to the possession in himself, nor authority from the legal owner: *Criner v. Pike*, 2 Head, 398. Ordinarily, says the court in that case, the party in possession is either the owner of the property or answerable over to the owner, and in either case he is entitled, not only to damages for the taking, but also for the value of the property.

•• This is the general rule. A defendant has been allowed to prove, in mitigation of damages, that the goods did not belong to the plaintiff, and that they have gone to the use of the true owner, either by being restored to him in specie, or taken upon legal process in payment of his debts, for in such case the plaintiff is not answerable over.

But Mr. Sedgwick thinks the principle of these decisions has been carried "quite far enough, . . . and that it will not do to permit acts of willful or wanton trespass to be excused by the defense of outstanding titles in third persons": See, also, *Logan v. Hartford City Coal Co.*, 9 Heisk. 690, where it is held that "mere possession is a sufficient title upon which to maintain trespass against a mere wrongdoer": *Crawford v. Bynum*, 7 Yerg. 381.

Miss Kelly having been placed in charge of Mr. Gavin, the latter had become the depositary of this money for the purpose of defraying her current expenses as they arose upon the journey.

It has been held that members of the same family, travel-

ing together, may carry each other's effects: *Dexter v. Syracuse etc. R. R. Co.*, 42 N. Y. 326; 1 Am. Rep. 527; *Curtis v. Delaware etc. Ry. Co.*, 74 N. Y. 116; 30 Am. Rep. 271.

We think that Miss Kelly, having been placed in charge of Mr. Gavin, was, *pro hac vice*, for the purposes of the journey, a member of his family, and that a gentleman in charge of ladies on such an occasion was their protector, and the proper ⁶¹ custodian of their money and personal effects intrusted to him.

In this view of the case we think it unnecessary to determine whether, at the time the theft was committed, the money was the property of Miss Kelly or her father, Martin Kelly. The proof shows the money was in the actual possession of Gavin, as its rightful depositary.

Other questions of minor importance were considered, and decided orally.

Affirmed.

SLEEPING-CAR COMPANIES.—LIABILITY AS INNKEEPERS for articles stolen from passengers in its cars: See *Pullman Palace Car Co. v. Iowa*, 28 Neb. 239; 26 Am. St. Rep. 325, and extended note thoroughly discussing the subject.

TRESPASS TO PERSONAL PROPERTY.—ACTION FOR BY ONE IN POSSESSION: See the extended note to *Orser v. Storms*, 18 Am. Dec. 548. The possession of a plaintiff is generally sufficient to enable him to maintain trespass *de bonis asportatis*: *Hutchinson v. Lord*, 1 Wis. 286; 60 Am. Dec. 381, and note.

RAILROAD v. SPENCE.

[93 TENNESSEE, 173.]

RAILWAY CORPORATIONS—FELLOW-SERVANTS.—A CONDUCTOR OF A RAILWAY TRAIN is not a fellow-servant of a fireman thereon, if the latter is under the control of the former, and required to submit to and obey his orders. The corporation is therefore answerable if such fireman is injured by the negligence of the conductor in passing a station when it was his duty to stop there until the arrival of another train, and, by reason of his not stopping, the two trains necessarily came into collision, from which the fireman received an injury.

MASTER AND SERVANT.—A MASTER IS ANSWERABLE TO AN INFERIOR SERVANT for injuries resulting from the negligence of a superior servant, if such negligence was in regard to some duty to the inferior imposed by law upon the master, and by him intrusted to the negligent superior servant.

RAILWAYS.—A CONDUCTOR OF A RAILWAY TRAIN IS A VICE-PRINCIPAL, for whose negligence the corporation is answerable to an inferior servant, if the negligence was in respect to regulating the movements of

trains in opposite directions, whereby they came into collision with each other.

MASTER AND SERVANT—CONCURRENT NEGLIGENCE OF THE MASTER AND OF A FELLOW-SERVANT.—If the negligence of a master combines with that of a fellow-servant, and the two contribute to the injury of another servant, he may recover damages of the master.

DAMAGES, MEASURE OF.—IN ESTIMATING THE DAMAGES RESULTING FROM THE LOSS OF THE LIFE OF A HUMAN BEING the jury should not be instructed to consider what amount the decedent was able to earn, and was earning, at and before his death, and to decide what he would have earned during the expectancy of his life from the time of his death, and then allow such sum as would reasonably compensate the plaintiff, his widow, for the loss of what he would have earned during such expectancy. The assessment of damages in actions of this character does not admit of fixed rules, and should be left to the sound discretion of the jury, after the court has pointed out the elements proper to be considered.

McCorry & Bond and M. B. Gilmore, for the plaintiff in error.

Haynes & Hays, for the defendant in error.

¹⁷⁴ McALISTER, J. The plaintiff below, Mrs. Ella Spence, brought this suit to recover damages for the killing of her husband, which she alleges was occasioned by the negligence of the railroad company. The plaintiff's intestate, W. G. Spence, at the time of the accident, was a fireman on a freight train going north from Jackson, which collided with a south-bound passenger train a few miles above Oakfield, and, in the collision, Spence sustained personal injuries from which he died in about one hour. The passenger train was coming south, and was designated on the time-table as No. 3. The freight train was going north, and was designated as No. 22. The passenger train was on time, and, ¹⁷⁵ according to the schedule, was due at Medina, a station seven miles north of Oakfield, at 2:02, and at Oakfield, a station eight miles north of Jackson, at 2:18, and at Jackson at 2:35. The freight train received orders at Jackson at 1:38, the engineer and conductor both receipting the train-dispatcher. These orders referred to other trains. They were told that the passenger train was on time. The engineer and conductor both had time-cards showing the time of the passenger train, and when due at stations. The time-card required that this freight train should reach Oakfield and take the siding five minutes in advance of the arrival of the passenger train. The freight train was, however, not stopped at Oakfield. As it approached the station the engineer sounded the whistle, the

brakes were applied, and one of the witnesses, a brakeman on this train named Poe, testified that the engineer gave him a signal to let the brakes off, which was done, and the train, passing Oakfield, went forward to the place of the accident. It appears that the crew in charge of the passenger train were in no default, but the collision was brought about by the negligence of those in charge of the freight in wrongfully passing Oakfield.

The *gravamen* of the plaintiff's action is, that her intestate husband was in the employment of the defendant company in the capacity of fireman on the locomotive engine of the freight train; that said train was in charge of one Barnett as conductor, who was superior in rank and grade, and ¹⁷⁶ whose orders the plaintiff's intestate was bound to obey; that said conductor represented the company in the management of said train, and was in command of the crew, with authority to order and direct their movements. Plaintiff claims it was the duty of the conductor and engineer, under the rules of the company, to have taken the siding at Oakfield, and to have held said freight train there until the arrival and passage of No. 3, which they knew was approaching from Medina, and that by passing Oakfield a collision was inevitable, as there was no intermediate station or sidetrack.

Plaintiff claims that she is entitled to a recovery whether the collision occurred by reason of the negligence of the conductor, or by the combined negligence of the engineer and conductor, as the latter represented the company, and plaintiff's intestate assumed no risk of any negligence on the part of the company or its immediate representative. It is further insisted that plaintiff's intestate was not guilty of contributory negligence in not observing the approach of the passenger train, since his duty was that of obedience, and he had a right to presume that the engineer and conductor had orders from the train-dispatcher to pass Oakfield, and meet the passenger train at some other station.

There was a verdict and judgment in favor of the plaintiff for twelve thousand dollars. The railroad company appealed, and has assigned errors.

The first assignment of error is based upon the ¹⁷⁷ following instructions of the court, given in charge to the jury, viz: "Where the direct or immediate cause of the accident is caused alone by the fault or negligence of the conductor in charge of the train, or where the fault or negligence of the

conductor and engineer equally bring about a collision, and caused the death of the fireman, he not being in fault, etc., a recovery can be had."

And again: "If it was the duty of Spence, the fireman, to put coal in the engine, and also look ahead for any obstructions on the track, and to look out for signals by the conductor, through the brakemen, and he did not have the control or management of the train, and no right to say whether it should stop or not, then he would stand in the relation of a subordinate to the conductor."

And again: "And if the proof shows that he was fireman, . . . and the conductor and engineer were both furnished with the rules and regulations of the company and a time-card, and . . . you find that the company held the conductor and engineer equally bound for the safety of the train and the observance of the rule not to run on the time of the passenger train, and further find that the engineer carried the train on by and failed to stop at Oakfield, and that the conductor failed or neglected to signal the engineer or try to stop the train, and you further find that the train went on and made no stop and had the collision, and plaintiff's husband was killed in the performance of his ¹⁷⁸ duty as fireman, without fault or negligence on his part, then plaintiff could recover."

Again: "If the rule or regulation of the company was equally binding on the engineer and conductor to stop and sidetrack, and they failed to do it, and the conductor took no steps to have the engineer stop at Oakfield, and you find that the failure to stop at Oakfield was the immediate and direct or proximate cause of the injury, and brought about by the fault or negligence of the conductor, then plaintiff could recover."

The specific exceptions to the instructions of the court recited above are, that Barnett, the conductor, Hillsman, the engineer, and Spence, the deceased fireman, were fellow-servants, engaged in the common employment of operating the train and getting it over the track, and that the company is not liable for personal injuries sustained by Spence, by reason of the negligence of either the conductor or engineer, or as the result of their combined negligence.

The general rule is well settled that, where the particular duties to be discharged require the services of several persons, as in the movement of railway trains, the safety of the

employee depends not only upon his own individual skill and prudence, but likewise upon the caution and competency of other persons associated with him in the business, and the employee assumes the risk of danger not only from his own negligence, but likewise from the negligence of his fellow-servants. But this ¹⁷⁹ general rule exempting the employer from liability to one servant for injuries sustained in consequence of the negligence of his fellow-servant, does not apply when it appears from the facts in the case that an employee in a subordinate position has been injured by the negligence or improper conduct of another servant, placed by the master in a superior position over the former, and where such inferior servant is made subject to the orders of such superior, and when the injury occurs during the performance of their duties. A servant who is in a position of authority over the subordinate servant is not, in the sense of the law, a fellow-servant in a common employment, but represents the master, who is liable for his negligence. The reason for this rule, stated by Judge McFarland, in *Railroad v. Wheless*, 10 Lea, 746, 43 Am. Rep. 317, is based, not upon the idea of the relative rank of the two servants or the general superiority of the one in position, intelligence, or skill, or in the wages received, but upon the ground that the one is placed under the orders and directions of the other, and required to submit to and obey such orders in the performance of his duties; that the inferior is placed in the position of a servant to the superior. In such cases the superior is held to represent the master.

In the case of *Louisville etc. Ry. Co. v. Lahr*, 86 Tenn. 340, Judge Lurton said, viz: "Where the inferior is injured while executing a lawful command of his superior, or where the superior represents and stands ¹⁸⁰ for the master, and has a right to control the movements of the train and of all the employees, in all such cases the rule of *respondet superior* applies with reference to any injury resulting from the official negligence of such superior": See, also, *Railroad v. Bowler*, 9 Heisk. 866; *East Tennessee etc. R. R. Co. v. Collins*, 85 Tenn. 227.

Says Judge Cooper, in *Railroad v. Handman*, 13 Lea, 423: "In order to charge the master the superior servant must so far stand in the place of the master as to be charged in the particular matter with the performance of a duty toward the inferior servant which, under the law, the master owes to such

servant." To the same effect is the statement of the rule by Judge McFarland, who says: "The plaintiff must show that his injury resulted from the carelessness or want of skill of some one who, in the particular matter, stands in the place of the master": *Railroad v. Wheless*, 10 Lea, 748; 43 Am. Rep. 317.

Judge Lurton, in *Coal Creek Min. Co. v. Davis*, 90 Tenn. 718, says: "Where there is proof tending to show negligence of a superior servant, whereby an inferior servant has been injured, the jury should be instructed that the mere superiority of grade or rank will not determine the liability of the common employer, but that they must look and see whether the negligence was in regard to some duty to the inferior imposed by law upon the master, and by the master intrusted to the negligent superior servant. If this be so, then the ¹⁸¹ rule of *respondeat superior* applies, for such a superior stands in the shoes of the master, and is a vice-principal."

The cardinal inquiry, then, that arises on this record is whether the defendant company owed any duty to the plaintiff's intestate the performance whereof was intrusted to the conductor, and whether the injuries were sustained in consequence of a violation of that duty. It will be conceded that it is the duty of a railroad company to regulate the movement of its trains so that those moving in opposite directions will not come in collision. As stated by the court in *Cleveland etc. R. R. Co. v. Keary*, 8 Ohio St. 210: "From the very nature of the contract of service between the company and its employees the company is under obligations to them to superintend and control, with care and skill, the dangerous force employed, upon which their safety so essentially depends. For this purpose," said the court, "the conductor is employed, and in this he directly represents the company. They contract for and engage his care and skill. They commission him to exercise that dominion over the operations of the train which essentially pertains to the prerogatives of the owner, and, in its exercise, he stands in the place of the owner, in the discharge of a duty which the owner, as a man, and as a party to the contract of service, owes to those placed under him, and whose lives may depend on his fidelity."

It necessarily follows that a conductor placed ¹⁸² in charge of a freight train, with authority to direct and control its movements, is a representative of the company, charged with

the performance of a duty which the company owes to the public and its employees on the train.

That the conductor was the superior of the fireman, and in full charge of the freight train, we think is abundantly shown in the testimony of J. A. Frates, the train-dispatcher of defendant, A. H. Ellington, the conductor of the collided passenger train, Wiggins, the division superintendent, and other railroad employees who were examined as witnesses.

Ellington testified, viz: "The engineer had no right to run by Oakfield, and the conductor had the right, and it was his duty, to have stopped the engineer in passing Oakfield; he had the authority, and ought to have stopped him." Again he says: "If, on approach to Oakfield, the engineer blew off brakes the conductor should have stopped him, and after he got past he ought to have stopped him."

J. A. Frates, the train-dispatcher, testified: "If he [the conductor] did not have time to make Medina it would have been his duty to see that the train was stopped at Oakfield, and get out of the way; to signal the engineer to stop, and see that the brakes were applied. Again, he should have arrived at Oakfield and been on the sidetrack five minutes before the schedule time of the passenger train." Again, he was asked if he (the conductor) ¹⁸³ had authority to stop the train, to which he replied in the affirmative.

N. D. Wiggins, division superintendent, testified that it was the duty of the conductor to have signaled him to stop.

W. B. Dunn, a freight conductor, testified "that, if the engineer attempted to pass on, it was the duty of the conductor to try to stop him."

Rule 4 of the company is, viz: "Engineers are required to obey the orders of conductors when not contrary to the spirit of these rules."

Rule 91. "Conductors will be held accountable for the conduct of their trainmen."

This evidence, we think, sufficiently shows the relation of the conductor to the company and the other employees, which was that of a vice-principal and representative of the company.

In the case of *Cleveland etc. R. R. Co. v. Keary*, 8 Ohio St. 201, it was held that when a brakeman in the employ of a railroad company, on a train under the control of a conductor having exclusive command, was injured by the carelessness of the conductor, the company was responsible; holding that the conductor, in such case, was the sole and immediate

representative of the company, upon whom rested the obligation to manage the train with skill and care.

The case of the *Chicago etc. Ry. Co. v. Ross*, 112 U. S. 390. was an action brought by a locomotive engineer to recover damages for injuries received in a collision, which was caused¹⁸⁴ by the negligence of the conductor of the train. The negligence of the conductor was in failing to show to the engineer the order which he had received to stop the train at South Minneapolis until the gravel train, coming on the same road from an opposite direction, had passed, and the engineer, in ignorance of the approach of the gravel train, went forward, and the collision occurred. It was held that the conductor and engineer, though both employees, were not fellow-servants; that the conductor was the representative of the company, standing in its place and stead in the running of the train, and that the engineer was, in that particular, his subordinate, and that for the former's negligence, by which the latter was injured, the company was responsible.

It is claimed by counsel for appellant, in their brief, that the Ross case has been virtually overruled by a recent decision of the United States supreme court, in the case of the *Baltimore etc. R. R. Co. v. Baugh*, 149 U. S. 368. We have carefully examined that case, and do not find that it overrules the Ross case.

The Ross case is in entire harmony with the adjudications of this court, and has been heretofore cited with approval: *East Tennessee etc. R. R. Co. v. De Armond*, 86 Tenn. 78; 6 Am. St. Rep. 816. The case of *Railroad v. Kenley*, 92 Tenn. 207, is the most recent enunciation by this court of the principles involved in this case. In that case it appeared that a brakeman had sustained personal injuries in consequence¹⁸⁵ of a defective foot-rest attached to the caboose, and used by the brakeman in ascending to the top of the car. The brakeman had made complaint to the conductor of his train that the foot-rest was defective, and the question presented for decision was whether notice to the conductor was notice to the company. It was contended that the conductor had no power or agency in the construction or repairing of cars, and that notice should have been served upon the car-inspector or master of trains. The court held that the conductor was the immediate superior of the brakeman, and his assurance that the matter would be remedied is, in law, to be imputed to the master. As the vice-principal, in charge of the train and as to the

crew operating the train, notice to him was notice to the master, and an assurance of remedy, made upon complaint of one of his subordinates, and in regard to an appliance upon his own train, was an act within the sphere of his duty toward his inferior.

The record shows that, as this freight train approached Oakfield, the brakes were applied by the trainmen, in accordance with their usual custom on reaching that station, but the engineer gave a signal to let the brakes off, and the train, without stopping at Oakfield, passed on to the place of the accident. The conductor, in permitting his freight train to pass Oakfield, in violation of the time-card rules, was guilty of official negligence, which in law is imputed to the company. It is ¹⁸⁶ strenuously insisted by counsel for the company that the negligence of Hillsman, the engineer of the freight train, in passing Oakfield in violation of the time-card rule, was the proximate cause of the accident, and that, as Hillsman, the engineer, and Spence, the deceased fireman, were fellow-servants, the company is not liable. This position cannot be maintained, for the reason that we find from the record that the conductor, as the immediate vice-principal and representative of the company, was in command of this train, and his official negligence is shown to have materially contributed to bring about the disaster.

The rule, as stated by Mr. Thompson in his work on Negligence, volume 2, page 981, is, viz: "If the negligence of the master combines with the negligence of a fellow-servant, and the two contribute to the injury, the servant injured may recover damages of the master." This rule was approved by this court in *Railroad v. Kenley*, 92 Tenn. 207, decided at Nashville. Judge Lurton, in that case, stated that the reason of the rule is obvious. The servant contracts to assume the dangers incident to the negligence of his fellow-servant, but he does not and cannot contract to assume the risk of the negligence of the master. Not agreeing to assume any part of the negligence of the master, if such negligence proximately contributes to his injury he may recover, notwithstanding his injury was due to the combined negligence of the master and his fellow-servant."

¹⁸⁷ The next assignment of error is as follows: "3. Error in court charging railroads are operated through their employees, and whenever any employee is guilty of any fault or negligence, that is the fault of the company itself, and, when

a party is injured because of that negligence, under certain circumstances he can recover."

This language was used by the circuit judge in opening his charge to the jury, and, when considered in connection with the language that immediately follows, it is fully explained, and could not have misled the jury. The very next sentence following the objectionable paragraph is, viz: "The rule of law in this state is, where a person is injured by the fault or negligence of a fellow-servant, then no recovery can be had. The engineer and fireman," the court continues, "in charge of an engine are fellow-servants, and whenever the accident is brought about alone by the fault or negligence of the engineer, then no recovery can be had."

We find no error in the instructions given by the court, nor in its refusal to charge as requested, but consider the charge a sound exposition of the law of the case.

It is next assigned as error that the court erred in excluding evidence, viz: Defendant's counsel asked the witness Poe "If Hillsman [the engineer] had been looking, state whether he could have seen the other train." While the court sustained the plaintiff's objection, the defendant ¹³⁸ in the very next answer got the benefit of the testimony desired. The next question asked Poe was as follows:

"Q. How was the road there? A. We were on a straight line."

"Q. How far ahead could he [Hillsman, the engineer] have seen on that straight line? A. He could have seen nearly a quarter of a mile."

"Q. Could he have seen ahead if he had been looking? A. Yes, sir; he could have seen further around than the other train [men] could."

The next assignment of error is based upon the charge in respect to the measure of damages, viz: "That, in estimating the damages, the jury should look to the proof as to what was the expectancy of life of the deceased, and see what amount he was able to and was earning at and before his death, and from all the proof decide what he would have earned during that expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during that expectancy of life from the time of his death."

This charge was erroneous. It was perfectly competent for the plaintiff to prove the expectancy of life of the deceased,

his capacity for earning money, his habits, age, and condition. But it was erroneous for the court to charge that they must "decide what he [the deceased] would have earned ¹⁸⁹ during that expectancy of life from the time of his death, and then allow her such sum as would reasonably compensate her for the loss of what he would have earned during that expectancy of life from the time of his death."

The assessment of damages in actions of this character does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion of the jury. The courts refuse to lay down any cast-iron rules or mathematical formula by which such damages are to be ciphered out by juries. It is the duty of the court to point out the different elements proper to be considered in the assessment of damages, but it is erroneous to give the jury a rule by which to figure out the damages as they would a mathematical problem in cases like this, where the future earnings of the deceased, and his expectation of life, are mere probabilities.

As stated by Judge Snodgrass in *Louisville etc. Ry. Co. v. Stacker*, 86 Tenn. 343; 6 Am. St. Rep. 840, "the age, condition, capacity of earning money, and expectation of life are all to be considered," but the circuit judge, in this instruction, tells the jury they must decide what the deceased would have earned during that expectancy of life, and allow his widow compensation for the loss of what he would have earned.

The amount deceased would have earned during his expectation of life was purely a matter of speculation, and his expectation of life was a mere probability.

¹⁹⁰ This instruction ignores the fact that plaintiff's intestate was engaged in a most hazardous occupation, and that his expectation of life while it was exposed to the perils of railroad service was more precarious than if he had been engaged in some less dangerous employment. The wages he would have earned were contingent upon his enjoyment of this precarious expectation of life, upon the constancy of his employment, and upon the performance of his duties with regularity and satisfaction to his employer.

The objection to the charge is, that both elements of damages are treated as assured facts, and the jury were invited to calculate the damages by this uncertain standard, instead of leaving the assessment of the damages to their sound dis-

This case, however, does not decide whether the statute may be relied on in the evidence or must be relied on in the pleadings.

In *Sneed v. Bradly*, 4 Sneed, 304, the court said: "The doctrine is now well established that upon a bill for the specific execution of such a contract, if the contract be fully set forth in the bill, and the defendant admits it in his answer, and submits to waive the statute of frauds, or does not insist upon the statute as a defense, a specific performance of the contract will be decreed."

It is also held in *Jennings v. Bishop* (Nashville, Dec. 1883), referred to in *Brakefield v. Anderson*, 87 Tenn. 206, that a parol contract may be specifically executed against either party if he fails or refuses to rely upon the statute.

None of these cases pass directly upon the point of practice now involved and under consideration. The case of *Townsend v. Sharp*, 2 Over. 192, is relied upon as settling the question in this state. In that case the action was brought upon a breach of a lease for fourteen months, and, among other things, the general issue was pleaded. The declaration also alleged that the lessee was to pay, and had paid, a certain quantity of corn in ²⁷⁹ part performance of his lease. Upon the trial the plaintiff offered to prove the statements made in the declaration by parol, to which the defendant objected; but the court overruled the objection, received the parol testimony, and instructed the jury that, if they believed the contract was made, and in part executed, by the parties the case was not within the statute.

The only question passed upon by this court, on appeal, was whether part performance would take the contract out of the statute. From an examination of other cases involving the statute we find that it has been the almost universal practice to plead it when it is to be relied on: See *Patton v. McClure*, Mart. & Y. 348; *Newman v. Carroll*, 3 Yerg. 26, and other cases.

When the case of *Townsend v. Sharp*, 2 Over. 192, was decided it was the holding of our courts that contracts not complying with the statute of frauds were void: See *Pipkin v. James*, 1 Humph. 325; 34 Am. Dec. 652; *Crippin v. Bear-den*, 5 Humph. 130, and other cases.

At the present time our holding is that such contracts are voidable merely, at the option of either party, and not void: See *Brakefield v. Anderson*, 87 Tenn. 206.

In view of this holding we are of opinion the better practice is to require the statute of frauds to be specially pleaded whenever it is desired to rely upon it as a defense. To allow the defendant to proceed with his defense and speculate upon ²⁸⁰ his chances of a successful opposition until a large bill of cost has accumulated, and then, when he finds the chances against him, to permit him to interpose the statute, would be an unreasonable advantage to him at the expense of the plaintiff. If the contract is voidable under the statute, and the defendant intends to rely upon that fact and avoid it, it is but just that he should so notify the plaintiff, to the end that the litigation may end. If he does not rely upon the statute in his pleading it is but just that the contract be enforced.

The mere denial of the execution of the contract is not equivalent to denying its validity and legality, since the contract may have been made, and still be invalid and voidable under the statute.

The judgment of the court below is reversed, and appellee will pay the costs of the appeal, and the cause is remanded to the court below for a new trial. The costs of the court below will be adjudged by that court.

STATUTE OF FRAUDS—NECESSITY FOR PLEADING.—The statute of frauds must be pleaded in order to constitute it a defense: *Switzer v. Skiles*, 3 Gilm. 529; 44 Am. Dec. 723, and note; *Osborne v. Endicott*, 65 Cal. 149; 65 Am. Dec. 498. See, also, the note to *Speyer v. Desjardins*, 36 Am. St. Rep. 477, and *Wentworth v. Wentworth*, 72 Am. Dec. 102, and the extended note to *Hotchkiss v. Ladd*, 86 Am. Dec. 684.

AKIN v. JONES.

[98 TENNESSEE, 353.]

BANKS AND BANKING.—AN INDORSEMENT FOR COLLECTION DOES NOT, as a general rule, vest title to the property in a bank, and if the paper passes into the hands of an assignee in insolvency of the bank, the owner may recover it or its proceeds.

BANKS AND BANKING—INSOLVENCY.—IF A COLLECTION INDORSED TO A BANK is collected by it, and it afterwards makes an assignment for the benefit of creditors, the relation between it and the owner of the property is that of debtor and creditor, and he cannot impose any trust upon the proceeds in the hands of the assignee, unless there is some agreement or course of dealing whereby the funds were to be held separate, and the identical proceeds remitted. The existence of such

agreement is disproved by evidence showing that the proceeds were directed to be transmitted by a check on another bank. The fact that the payment of the collection was made in overdrafts which were, subsequently to the assignment, paid to the assignee, is not material.

BANKS AND BANKING.—A COLLECTING BANK IS ENTITLED TO RECEIVE IN PAYMENT overdrafts and certificates of deposit on itself, and thereby to discharge the debtor.

AN ASSIGNEE FOR THE BENEFIT OF CREDITORS TAKES THE PROPERTY AND CHOOSES IN ACTION of his assignor, not as a purchaser for value, but as a volunteer, and therefore subject to all defenses to which they would be subject if in the hands of the assignor.

BANKS AND BANKING.—A CHECK DRAWN ON A BANK IS NOT AN EQUITABLE ASSIGNMENT, and therefore is not entitled to precedence over an assignment for the benefit of creditors made by the drawer before the check is accepted or presented for payment.

Sam Holding, E. H. Hatcher, and George T. Hughes, for Akin.

J. C. McReynolds, for Jones.

³⁵⁴ **McALISTER, J.** The question presented in this record, stated in general terms, is, whether the holder of two certain checks drawn by the Bank of Columbia prior to making a general assignment, is entitled to payment in full out of certain funds in the hands of the assignee of said bank, or whether said check-holder is merely a general creditor of said bank, and, as such, only entitled to a ratable share in the distribution of its assets. It appears from the record that on October 17, 1891, the Bank of Columbia made a general assignment for the benefit of its creditors. The ³⁵⁵ trustee named in the deed having declined to serve, A. N. Akin was duly appointed, and has been administering the trust. The present bill was filed by the trustee against the creditors of said bank for the settlement of all matters growing out of said trust, and for the adjudication of all questions of priorities.

The defendants, J. W. Manier & Co., are merchants doing business in Nashville, and, on or about September 29, 1891, inclosed to the Bank of Columbia a draft on Massey & Son, of Lipscomb, Tennessee, for the sum of one hundred and thirty-seven dollars and twenty cents, drawn by Manier & Co. to their own order, and indorsed by said firm to the Bank of Columbia for collection. Massey & Son, the drawees of said draft, on October 15, 1891, gave their check on the Bank of Columbia in payment of said draft, which overdrew their account in said bank in the sum of one hundred and two dollars and twelve cents. It appears that Massey & Son had

to their credit in said bank, at the time of drawing the check, the sum of thirty-five dollars. The draft was canceled by the bank and delivered up to Massey & Son. Manier & Co., in their letter inclosing the draft for collection, had directed the bank to remit the proceeds in New York exchange. On October 16, 1891, the Bank of Columbia sent to Manier & Co. its check on the Merchants' National Bank of Louisville, covering proceeds of draft on Massey & Son. Manier & Co. received said check on October 17th, and immediately telegraphed to the Merchants' National ²⁵⁶ Bank of Louisville to know if this check would be paid, and were informed that it would not be paid. It appears that on the same day the Bank of Columbia made a general assignment for the benefit of its creditors. Manier & Co., on the same day, returned this check to the Bank of Columbia, informing its cashier they would claim payment in full out of the assets of said trust. It further appears that at the time Manier & Co. received the draft on the Merchants' National Bank of Louisville, Kentucky, there was to the credit of the Bank of Columbia in said Louisville bank something over two thousand two hundred and fifty dollars. All drafts drawn on the Louisville bank by the Bank of Columbia subsequent to October 14, 1891, were refused payment when presented. Some time after the assignment the Merchants' National Bank of Louisville, with the assent of the trustee of the Bank of Columbia, but without the knowledge of Manier & Co., paid out of the funds to the credit of the Bank of Columbia such drafts as had been presented to it, in the order of presentation, until the whole fund was exhausted. The telegram sent by Manier & Co. to the Merchants' National Bank was received, and payment of their check refused, before the presentation of many of the drafts which were afterward paid. No offer has been made to pay the draft held by Manier & Co., and there are now no funds with which to pay it to the credit of the Bank of Columbia in the Louisville bank. It further appears, that, after the affairs of the ²⁵⁷ Bank of Columbia went into the hands of the assignee, Massey & Son paid their overdraft, amounting to one hundred and two dollars and twelve cents, in full to said assignee. This is a full statement of facts appearing in the record with respect to the check on the Merchants' National Bank of Louisville given by the Bank of Columbia to Manier & Co. for the proceeds of their draft on Massey & Son.

The other claim of Manier & Co. is based upon the following statement of agreed facts: It appears that on or about September 8, 1891, Manier & Co. inclosed to the Bank of Columbia, for collection, the note of W. K. Stephens, dated July 8, 1891, payable to the order of Manier & Co., and due October 1st thereafter, for the sum of one hundred and ninety-five dollars and ninety-five cents. The bank was directed to remit the proceeds of the note to Manier & Co. in New York exchange. On October 13, 1891, W. K. Stephens, the maker of this note, paid it by an overdraft on the Bank of Columbia. At the time his check was given the account of Stephens was overdrawn in the sum of eleven hundred dollars, and had remained overdrawn since May 31, 1891. On October 13, 1891, the Bank of Columbia sent to Manier & Co. their check on the Importers and Traders' National Bank of New York for the sum of one hundred and ninety-five dollars and forty-five cents, with the advice that it was given for the amount collected on the Stephens note. This check was received in due course of mail by Manier & Co., and at once forwarded by them to New York, and presented for payment. Payment was refused, and thereupon ²⁵⁸ the check was protested, and all proper notices given. Manier & Co. immediately notified the trustee for the Bank of Columbia, and made claim on him for the full amount of the check.

As already stated in connection with the Massey & Son draft, the Bank of Columbia, on October 17, 1891, made a general assignment for the benefit of its creditors. It further appears that, when the check was presented to the Importers and Traders' National Bank of New York, there was to the credit of the Bank of Columbia in the New York bank sufficient funds to meet it. Subsequent to presentation of defendant's check, the Importers and Traders' National Bank paid to the trustee of the Bank of Columbia the balance to the credit of said bank, and this amount the trustee now holds as a separate fund, subject to the orders of the court in this case. It should be stated that, after the affairs of the bank went into the hands of the assignee, it was ascertained that Stephens' account was overdrawn on October 16th, the last day the bank transacted business, in the sum of fourteen hundred dollars, and that it had been overdrawn more than three hundred dollars since July 31, 1891. The assignee, acting upon advice of counsel, after-

ward compromised and settled Stephens' overdraft, realizing something more than fifty per cent of same, which went into the trust fund.

Upon the foregoing facts the chancellor decreed, viz: 1. That Manier & Co. had the right to repudiate the check on Louisville given by the ³⁵⁹ Bank of Columbia in payment of the Massey & Son draft, in violation of instructions to send New York exchange; 2. That in respect to the amount of Massey & Son's overdraft on the Bank of Columbia—to wit, the sum of one hundred and two dollars and twelve cents—which was made by paying to the said bank the draft of Manier & Co. on Massey & Son, and which was collected by the trustee of said bank after its failure, that, as to this amount, Manier & Co. were entitled to be paid in full and in preference to the general creditors of said bank; 3. But as to the sum of thirty-five dollars which Massey & Son had on deposit when they gave their check to the bank for the draft of Manier & Co., and which, therefore, the bank actually received before its failure, that, as to this amount, Manier & Co. were not entitled to be paid in full in preference to the general creditors of said bank, but were only entitled to receive their *pro rata*; 4. That as to the Stephens collection, Manier & Co. accepted the check on the Importers and Traders' National Bank in payment of said collection, but that said check was not an equitable assignment *pro tanto* of the funds of the Bank of Columbia in the hands of the New York bank, and which afterward came into the hands of the trustee of the Bank of Columbia, and that therefore Manier & Co. were only general creditors of said Bank of Columbia, and, as such, were only entitled to receive their *pro rata* upon said note.

From so much of said decree as adjudges that ³⁶⁰ Manier & Co. are entitled to be paid in full the sum of one hundred and two dollars and twelve cents in preference to the general creditors of the Bank of Columbia, the complainant, A. N. Akin, appealed, and has assigned errors. The defendant Manier & Co. have appealed from so much of said decree as adjudges that they are only entitled to receive their *pro rata* upon the check of the Bank of Columbia on the Importers' and Traders' Bank of New York, given in payment of the Stephens note.

It is assigned as error by counsel for A. N. Akin, trustee, that the chancellor adjudged that Manier & Co. were entitled

to be paid in full, in preference to the general creditors, the amount of Massey & Son's overdraft, which was collected by the trustee. It is insisted, on behalf of the trustee, that, although indorsements for collection vest no title to the draft in the bank, and, if the draft is collected by the trustee of the bank after its failure, the law impresses a trust upon the proceeds in favor of the owner, yet, if the draft is collected by the bank before its failure, and while it is a going concern, and the transaction of payment is complete between the bank and the drawee, then the relation of the bank to the owner of the draft is that of debtor and creditor, and there is no trust in favor of the owner, and he has no preferred lien upon the assets of the bank in the hands of the assignee, but can only take his *pro rata* share in the distribution of the assets.

On the other hand, it is insisted on behalf of ³⁶¹ Manier & Co., that when paper is sent to a bank indorsed for collection, with instructions to remit the proceeds, the bank holds said paper as the agent or trustee for sender, and funds collected on same are trust funds, held by it for sender; that the bank in this case held the collections as agent or trustee, charged with the duty to collect them in money, which, if received, would have been a trust fund, but as the bank improperly received an overdraft or debt against the maker, the owners of the collection can claim these overdrafts or debts in the hands of the assignee. Defendants Manier & Co. further insist, that, if these overdrafts, made to pay their drafts, were afterward paid to the assignee it amounted, in a court of equity, to a payment of the collections themselves.

The general rule on this subject is, that an indorsement for collection vests no title to the paper in the bank, and, if the paper passes into the hands of the assignee after insolvency, the owner may recover it specifically; or, if the assignee collects the paper, the owner may recover the proceeds. But, if the bank makes the collection before the assignment, it simply becomes an ordinary contract debtor of the owner, and he cannot impress any trust upon the proceeds: 1 Morse on Banks and Banking, sec. 248. Of course there may be special facts in a case which will take it out of the ordinary rule, and create a trust in the funds collected. Such special facts were found in the case of *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. ³⁶² St. Rep. 85, cited by

counsel for defendant. In this case the agreement between the two banks in reference to the proceeds was that "they should be preserved by said bank as the property of the complainant, and returned to it as such." The court thought these special facts settled the question of trust in favor of the complainant. But the rule undoubtedly is, that unless there is some agreement or course of dealing whereby the funds are to be held separate, and the identical proceeds remitted, the owner of the drafts stands upon no higher ground than the other creditors of the bank in a case where the bank collects the draft prior to making a general assignment.

It will be noticed that in this case Manier & Co. directed the bank to send New York exchange; that is to say, Manier & Co. directed the Bank of Columbia to send them its check on New York in payment of the proceeds of collection. As stated by counsel, "this is the determining fact in the record. It was virtually an express direction not to send the identical moneys collected, nor to hold them separate for Manier & Co., but was equivalent to an agreement that the bank might use the money collected, and pay Manier & Co. by its check on New York. Any agreement or understanding or course of dealing whereby the bank is to use the identical moneys collected, and substitute its own obligation in its stead, destroys all idea of a trust."

363 It is argued, however, that the overdrafts made by the drawees on the Bank of Columbia to pay their drafts due to Manier & Co., were afterwards paid to the assignee, and such payment amounted, in a court of equity, to a payment of the drafts themselves to the assignee. This view of the case cannot be maintained. The transaction between the bank and Massey & Son and W. K. Stephens, the drawees of the drafts, was a completed transaction. Massey & Son and Stephens gave their checks on the Bank of Columbia for the amount of the drafts drawn against them, respectively, and the drafts were canceled and delivered up to the drawees. The fact that the bank allowed the drawees to overdraw their accounts does not affect the question of payment. In his work on Commercial Paper Mr. Randolph says: "If the holder of a bill directs that it be paid to a certain banker, procuring credit with such banker will amount to a payment of the bill. So, if the amount of a note is credited to a bank holding it for collection (according to the custom of dealing between the banks), it will be a payment, although the bank

making the note and giving the credit failed on the day it was so credited": 8 Randolph on Commercial Paper, secs. 1395-1456.

The doctrine has been extended, and collecting banks have been recognized as authorized to receive their own certificates of deposit in payment, and the debtor is discharged, even though the bank ³⁶⁴ fails before remitting: See *Howard v. Walker*, 92 Tenn. 456.

The next question presented is in respect to the check given by the Bank of Columbia on the Importers and Traders' National Bank of New York in payment of the Stephens note. It is insisted by counsel for Manier & Co. that they are entitled to be paid in full, for the reason that this check was an equitable assignment *pro tanto* of the funds of the Bank of Columbia in the hands of the New York bank, and that the New York bank having refused to pay the check, and having returned the funds in its hands to the trustee of the Bank of Columbia, defendants are entitled to the payment of this check in full. It is insisted that the assignee for the benefit of creditors takes the property and choses in action of his assignor, not as a purchaser for value, but as a volunteer, and therefore subject to all the defenses and equities against them in the hands of the assignor, and not only so, but that he holds as the representative of the assignor and his estate. This principle is well settled, and will not be further noticed: *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336.

The other question, however, in respect to equitable assignments, is involved in much conflict of authority. Mr. Morse, in his work on Banks and Banking, volume 2, section 493, formulates the question thus: "Is a check an equitable assignment between the drawer and a *bona fide* holder for value, so that ³⁶⁵ the latter will be preferred over general creditors of the drawer in case of his insolvency before the check is cashed?" The author answers the question by stating that "the most numerous body of decisions sustains the view that a check is neither a legal nor an equitable assignment as between drawer and payee, nor a sufficient foundation for any action by the holder against the bank." The author qualifies the statement with the remark that there may exist special facts giving an equation of easy solution, as if the check is drawn on a designated fund, or is accepted by the bank, or if the bank charges the amount to the drawer or settles with

him on the basis of allowing for the check. In these and other instances enumerated the author states there is no doubt the bank can be held in an action by the holder. Counsel for Manier & Co. cite several *dicta* to be found in our own cases, to the effect that a check is an appropriation by the debtor of so much of his deposit in bank to his creditor: See *Springfield v. Green*, 7 Baxt. 302; *Schoolfield v. Moon*, 9 Heisk. 173; *Planters' Bank v. Merritt*, 7 Heisk. 193. It will be found, upon an examination of these cases, that the only question presented for adjudication was in respect to the liability of the drawer—whether he was discharged by the failure of the holder to present his check in a reasonable time—the bank in the mean time having become insolvent. The case of *Imboden v. Perris*, 13 Lea, 504, involved more of the features presented in this case than any other ³⁶⁶ reported in this state. In that case the question arose between creditors. One creditor held a check of the debtor against a general deposit of the debtor in bank, while the other was an attachment creditor of that fund. The question was fairly raised in that case whether the check worked an equitable assignment of the fund in bank to the check-holder before the presentation of the check or notice to the bank. If so, the check-holding creditor was entitled to priority. If not, then the attachment had priority. Judge Turney, in delivering the opinion of the court against the defendant's theory of equitable assignment, cited approvingly the opinion of Chief Justice Church in *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55, to the effect that "checks drawn in the ordinary form, not describing any particular fund or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer, but containing only the usual request, are of the same effect as inland bills of exchange, and do not amount to an assignment of the funds of the drawer in bank. This doctrine," he continues, "accords with the relation between the parties. Banks are debtors to their customers for the amount of their deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer or to the order of the payee. Until presented and accepted it is inchoate; it vests no title, legal or equitable, in the payee to the fund. Before acceptance the drawer ³⁶⁷ may withdraw his deposits. The bank owes no duty to the holder until the check is presented for payment. Knowledge that checks

have been drawn does not make it obligatory upon the bank to retain the deposits to meet them. These rules are indispensable to the safe transaction of commercial business."

It is contended by counsel for Manier & Co. that the case of *Imboden v. Perrie*, 18 Lea, 504, did not raise the identical question here presented. It is insisted that the question in that case arose between creditors, but that the question presented here is between the drawer and the payee of the check, the assignee standing in the shoes of the drawer. The case of *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55, cited with approval by Judge Turney in *Imboden v. Perrie*, 18 Lea, 504, presented the exact state of facts found in this record. In that case the insurance company gave its check upon a trust company in payment of a loss, the company having at the time on deposit a sum exceeding the amount of the check, but, prior to its presentation, a receiver of the insurance company was appointed, who withdrew all the funds deposited with the trust company. In an action by the check-holder against the receiver to recover the full amount of the check out of the funds in his hands it was held by the court of appeals of New York that the check, not having been drawn on a particular fund, was not an equitable assignment *pro tanto* of a general deposit, ~~see~~ and that the check-holder was not entitled to payment in full in preference to the claims of other creditors: See, also, *Risley v. Phoenix Bank*, 83 N. Y. 318; 38 Am. Rep. 421; *Etna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 87; 7 Am. Rep. 314.

We are of opinion that the great weight of authority is opposed to the contention of defendant, and establishes the doctrine that the delivery of a check against a general deposit is not a legal or equitable assignment of any portion of the fund.

The decree of the chancellor, to the extent that it allows defendants priority in the payment of the Massey & Son overdraft is reversed, and in all other respects affirmed. The costs will be paid by the trustee.

BANKS AND BANKING.—INDORSEMENT FOR COLLECTION does not transfer title to the indorsee, but merely constitutes him the agent of the indorser: *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 99; 32 Am. St. Rep. 332, and note; note to *Adrian v. McCaskill*, 14 Am. St. Rep. 793; note to *First Nat. Bank v. Davis*, 41 Am. St. Rep. 799.

ASSIGNMENT FOR BENEFIT OF CREDITORS—INDORSEMENT FOR COLLECTION. An assignee for the benefit of creditors can acquire no better title to a draft or check indorsed to his assignor for collection than the latter had; and if he disposes of or pays out paper or money, though in good faith, and not under order of court, to which his assignor had no title, he is answerable to the owner thereof: *National etc. Bank v. Hubbell*, 117 N. Y. 384; 15 Am. St. Rep. 515.

BANKS AND BANKING.—THE RELATION BETWEEN A BANK TRANSMITTING PAPER FOR COLLECTION AND THE BANK RECEIVING AND COLLECTING IT, and mingling its proceeds with other funds, is merely that of debtor and creditor, and the creditor bank has no lien upon or for moneys collected, and no preference over the other creditors of the receiving bank: *First Nat. Bank v. Davis*, 114 N. C. 343; 41 Am. St. Rep. 795.

RIGHTS OF OWNER AGAINST BANK WHICH COLLECTS HIS NOTE, and remits by check, but fails before it is paid: *Billingsley v. Pollock*, 69 Miss. 759; 30 Am. St. Rep. 585.

AN ASSIGNEE FOR THE BENEFIT OF CREDITORS takes only the rights of his assignor: *National etc. Bank v. Hubbell*, 117 N. Y. 384; 15 Am. St. Rep. 515, and note. As to right of correspondent bank to hold paper received for collection, or the proceeds of it, as against the owner, in case of the insolvency of the receiving bank, see monographic note to *First Nat. Bank v. Strauss*, 14 Am. St. Rep. 583-586.

CLARK v. JONES.

[93 TENNESSEE, 639.]

TRUST DEED.—THE TRANSFER OF A NOTE, THE PAYMENT OF WHICH IS SECURED by a trust deed, entitles the transferee to the benefit of that security and the enforcement of the trust.

A TRUST DEED MAY BE FORECLOSED, and it is not necessary to sustain a suit in foreclosure that a demand should have been made on the trustee, and that he should have refused to execute the trust, and that its execution should have been impeded by any person or cause.

TRUST DEED.—THE COSTS OF FORECLOSING A TRUST DEED made to secure a debt must be borne by the creditor, unless there was some reason why he did not resort to the less expensive remedy of a sale by the trustee without judicial proceedings.

ATTORNEY'S FEES FOR FORECLOSING A TRUST DEED WILL NOT BE ALLOWED, though the note to secure which it was given stipulated for the payment of a reasonable attorney's fee if necessary to resort to suit, if, as a matter of fact, the trustee was willing to proceed under the power contained in the deed, and the proceedings on the part of the attorney were unnecessary.

TRUST DEED, TERMS OF MUST CONTROL.—If a trust deed provides for a sale for cash with the right of redemption the court has no power to direct a sale on a credit of six months and barring the right of redemption.

Elder & Patton, for the respondent.

N. H. Burt, for the appellant.

⁶⁴⁰ CALDWELL, J. This is a foreclosure bill. On July 27, 1891, A. G. Hickman sold and conveyed to R. L. Jones a tract of land in Hamilton county, taking his six months' promissory note for two hundred and fifty dollars as part of the consideration. The note recited on its face that it was given for a part of the purchase price, and that its payment was secured by a deed of trust on the land. In pursuance of their agreement, Jones, on the same day, reconveyed the land to Hickman, as trustee, with full power of sale in case the note should not be paid at maturity. Thereafter Hickman sold and indorsed the note to W. L. Clark. Default having been made, Clark, as holder and owner of the note, filed this bill against Jones, as maker of the note and deed of trust and against Hickman, ⁶⁴¹ as indorser and trustee, to foreclose the deed of trust under the decrees of the court.

Jones demurred to the bill: 1. Because it did not allege a transfer of the deed of trust by Hickman to Clark; and 2. Because it did not allege that the trustee had refused to execute the trust, or that Jones had done any thing to prevent him from doing so.

The demurrer was overruled, and Jones filed an answer, denying, in many different forms, the right of complainant to have the deed of trust foreclosed by decree of court, when the way for a sale by the trustee was entirely free and unobstructed.

Hickman, the trustee, answered, stating that he had ever been ready and willing to execute his power of sale, if the complainant should request him so to do.

Hearing the cause upon the whole record, the chancellor granted the relief sought in the bill. The land was sold, and the sale confirmed. Defendant, Jones, has appealed.

1. The first ground of demurrer was properly overruled. It was not necessary to Clark's enjoyment of the security provided for his note that it should have been formally transferred to him. The transfer of the note, without more, carried with it the lien created by the deed of trust: *Graham v. McCampbell*, Meigs, 52; 33 Am. Dec. 126; *Cleveland v. Martin*, 2 Head, 129; *Roberts v. Francis*, 2 Heisk. 133; *McCallum v. Jobe*, 1 Tenn. Leg. Rep. 244; *Anthony v. Smith*, 9 Humph. 511; *Thompson v. Pyland*, 3 Head, 539.

⁶⁴² 2. The second ground of demurrer was also properly overruled. It was not necessary to the relief sought that complainant should have alleged that the trustee had refused

to execute the trust, or that his execution of it had been impeded by the maker or any other person. The mere allegation of the valid existence of the note and deed of trust, and of complainant's ownership of the note, and that it was past due and unpaid, gave him a standing in court.

The jurisdiction of courts of equity to foreclose mortgages is almost as old as the courts themselves; formerly it was exclusive, because such instruments then conferred no power of sale upon any individual. Now, however, mortgages with power of sale, or deeds of trust, are very generally adopted as security for debt. These may be foreclosed by the person designated for that purpose, or, at the election of the mortgagee or beneficiary, by a court of equity. The introduction of the later mode of foreclosure does not supersede the former one, but is in addition to it; it is merely cumulative: *Bennett v. Union Bank*, 5 Humph. 615; *McDonald v. Vinson*, 56 Miss. 497; 2 Perry on Trusts, sec. 602 *gg*; 1 Jones on Mortgages, sec. 1443; 8 Am. & Eng. Ency. of Law, 277, 278, and cases cited.

3. But, since mortgages, with power of sale or deeds of trust, are resorted to because affording a less expensive, as well as a more convenient and more expeditious, mode of foreclosure than that ⁶⁴³ formerly existing, the makers will not be required to pay the greater expense of a foreclosure in equity, unless some good and sufficient reason be shown for taking the matter into court. No such reason is shown to have existed in this case; hence, the full costs should not have been adjudged against Jones. He was properly taxable with only so much expense as would have been incurred in a sale by the trustee.

4. It was also error to charge Jones with complainant's attorney's fee in this case. It is true that Jones agreed, in the face of his note, that he would pay a reasonable attorney's fee, "if necessary to resort" to suit for the collection of the note; but no such resort is shown to have been necessary. On the contrary, it appears that the note could have been collected without litigation. The mode of payment provided in the deed of trust was ample. The trustee had full power of sale, was ready and willing to sell, and could have sold easily, and without interruption, at any time.

5. The deed of trust provided for a sale for cash, with right of redemption in the maker. The court, upon the application of complainant, ordered a sale on a credit of six

and twelve months, barring the right of redemption. This was error. The terms of sale prescribed in the instrument creating the lien were controlling: See *Knor v. McCain*, 13 Lea, 199, overruling *Frierson v. Blanton*, 1 Baxt. 272.

644 6. Reverse, and direct sale for cash, with right of redemption. Complainant will pay all costs up to this time, and Jones will pay costs of sale hereafter made, upon the ground that the latter will be about the same as if sale had been made by trustee.

TRUST DEEDS—RIGHTS OF PARTIES SECURED BY.—The recovery of a judgment on a debt secured by a trust deed does not merge such debt so that it is no longer secured by the deed: *Gibson v. Green*, 89 Va. 524; 37 Am. St. Rep. 888, and note.

TRUST DEEDS—FORECLOSURE.—NECESSITY FOR DEMAND UPON THE TRUSTEE: See *Seibert v. Minneapolis etc. Ry. Co.*, 52 Minn. 148; 38 Am. St. Rep. 530.

TRUST DEEDS—TERMS MUST CONTROL.—A power of sale contained in a deed of trust must be strictly followed to render its exercise valid: *Schaefer v. Haberecht*, 117 Ma. 22; 38 Am. St. Rep. 631. The conduct of trustees in the management and disposition of trust property must be regulated and controlled by the provisions and conditions of the deed of trust: *Hunt v. Townsend*, 31 Md. 336; 100 Am. Dec. 63. A trustee under a deed of trust has no power to impose new terms or conditions, or to alter or vary those contained in the deed; *Cassell v. Ross*, 33 Ill. 244; 85 Am. Dec. 270, and note.

LOOKOUT BANK v. AULL

[98 TENNESSEE, 645.]

PRINCIPAL AND SURETY—DEFENSE THAT ANOTHER SHOULD HAVE SIGNED AS COSURETY.—If a note negotiable in form is executed by one as a surety, and is left in the hands of the principal debtor upon condition that another shall also sign as surety before the delivery of the note, such note, though not signed by the other intended surety, is a valid and enforceable obligation as against the surety who signed it, if it has passed into the hands of a *bona fide* holder for value, and in due course of trade and before maturity.

BANKS AND BANKING, CASHIER, NOTE PAYABLE TO.—A negotiable instrument made to, and in the name of, a cashier of a bank, of which the bank's money is the consideration, may be sued on in the name of the bank without any indorsement by the cashier.

NEGOTIABLE INSTRUMENTS.—THE ORIGINAL PAYEE named in a negotiable instrument is, to the same extent as a subsequent indorsee, entitled to the protection due to a *bona fide* holder against all defenses of which he had no notice at the time of receiving the paper.

NEGOTIABLE INSTRUMENT TAKEN IN RENEWAL OF A PRE-EXISTING NOTE which is surrendered, and the sureties thereon released, makes its payee a *bona fide* holder for value and entitled to protection as such against any defenses of which he had no notice when he received it.

Clift & Cantrell, for the appellant Aull.

J. A. Caldwell, for the respondent.

646 BEARD, J. The bill in this cause was filed, seeking a decree against Aull and Clift, who were sureties of one O'Brien on a note of three thousand dollars, payable six months after date to the order of "J. O. Rice, Cashier." The defendants resist recovery upon the ground that this note was signed by them as sureties upon the distinct agreement with their principal, O'Brien, that he would not deliver it to the payee until he had one Baskett to sign it as cosurety with them, and that, in disregard of this agreement, and without their knowledge or consent, it was turned over to the payee, who accepted it in payment of a pre-existing debt. These defenses are made out by the evidence in the record. At the same time it affirmatively appears that complainant accepted the note sued on without any notice of the facts thus relied on by defendants. 647 A decree was pronounced against the sureties, and they have appealed.

The case rests on the question, Was complainant the *bona fide* holder of this note for value, before maturity, and in due course of trade? If so, then the decree of the chancellor must be affirmed.

It is settled that a note, though negotiable in form, signed by a surety and placed in the hands of another party, upon condition that it is not to be delivered to the payee until some other person shall sign it, is an escrow, and, as to the original parties or the payee taking it with notice of such condition, remains an escrow, and, as such, is not enforceable against this surety: *Perry v. Patterson*, 5 Humph. 133; 42 Am. Dec. 424.

It is equally well settled that such a note will become a valid and enforceable obligation of the surety imposing the condition when it passes from the party holding it in escrow into the hands of a *bona fide* holder for value, in due course of trade, and before maturity: *Merritt v. Duncan*, 7 Heisk. 156; 19 Am. Rep. 612; *Jordan v. Jordan*, 10 Lea, 124; 43 Am. Rep. 294.

1. It is insisted complainant is not such a holder, because the note is payable to "J. O. Rice, Cashier," and is not indorsed by him to complainant. While this is the condition of this note, yet the record shows the payee to have been the cashier of complainant bank at the time the note was taken,

as well as when this suit was brought; that the bank's money was the consideration ⁶⁴⁸ for it, and that it was from the beginning the bank's property.

There are old cases holding, in such a case, the bank could not sue in its own name on such a note without an indorsement of it by the payee: *Bank of United States v. Lyman*, 20 Vt. 666; *Horah v. Long*, 4 Dev. & B. 274; 34 Am. Dec. 378. But the authority of these cases has been overthrown, and the consensus of judicial opinion now is that such a note executed under the conditions just stated, is, upon delivery, *ipso facto* the property of the bank, and can be sued upon without indorsement: 1 Randolph on Commercial Paper, secs. 138, 157; 2 Daniel on Notes and Bills, sec. 1189.

2. It is further insisted that, as the note sued on is the property of the payee, the rule protecting the title of a *bona fide* holder of negotiable paper does not apply, the argument being that the rule can only be invoked by some one holding after the instrument has passed from the payee to an indorsee for value. This contention, however, is unsound, as is held in *Jordan v. Jordan*, 10 Lea, 124; 48 Am. Rep. 294.

3. Finally, it is urged the note was taken for a pre-existing debt.

The paper in question was a renewal, and was the last of a series of six months' notes, for the same amount, covering a period of five years. According to the testimony of defendant, Aull, the note, of which the present is the renewal, was, upon the execution of this one, surrendered ⁶⁴⁹ by the bank to O'Brien. On this surrendered note were the names of Clift, Baskett, and Albright as sureties. The present note has upon it the names of Clift and Aull as sureties. The present note extinguished the older one, thereby releasing Baskett and Albright. We hold that while the original consideration ran through the various renewal notes into the present one, yet the surrender and extinguishment of the older note, and the consequent release of Baskett and Albright, makes complainant the *bona fide* holder for value of this note now sued on: *Nichol v. Bate*, 10 Yerg. 429; *Cherry v. Frost*, 7 Lea, 1; *Jordan v. Jordan*, 10 Lea, 124; 48 Am. Rep. 294.

The decree of the chancellor is affirmed.

SURETYSHIP.—For defense, as applied to bonds, that another should have signed as co-surety, where the instrument is delivered without notice of the condition that it should be so signed, see *Dun v. Garrett*, 93 Tenn. 650; *post*, p. 937, and note.

NEGOTIABLE INSTRUMENTS.—BONA FIDE HOLDERS OF ARE ENTITLED TO PROTECTION AGAINST EQUITIES or defenses of which they had no notice: See note to *Craighead v. Wells*, 35 Am. Rep. 691. One taking a note in payment of a precedent debt, before maturity of such note, and without notice of prior equities between the original parties, is a *bona fide* holder: See notes to *Russell v. Haddock*, 44 Am. Dec. 698, and *Emanuel v. White*, 69 Am. Dec. 387.

DUN v. GARRETT.

[98 TENNESSEE, 650.]

PRINCIPAL AND SURETY—BOND DELIVERED CONTRARY TO CONDITION.—A

SURETY WHO EXECUTES A BOND, unofficial in character and perfect in form, cannot escape liability thereon by proving that he left it in the hands of his principal upon condition that it should not be delivered until another person had executed it as a cosurety, if such bond was delivered to the obligee named therein without notice to him of the condition relied upon.

Pritchard & Sizer, for the appellant Dun.

Clark & Brown, for the respondent Garrett.

651 BEARD, J. A bond, unofficial in character, was executed by one Garrett as principal, and by these defendants as his sureties, payable to complainant as obligee. This bond, regular in its form and perfect on its face, was delivered by the principal obligor to the obligee, and was accepted by the latter in good faith, as a complete instrument, without any facts or circumstances attending its delivery to excite suspicion or cause inquiry on the obligee's part as to the mode of its execution. On these facts the question here presented for determination is this: After loss, covered by the terms of this bond, has occurred to the obligee, by the default of the principal obligor, can a surety avoid recovery for this loss upon the ground that he had made a private agreement with his principal, at the time of signing and leaving it in the latter's hands, that the principal obligor should not deliver it to the obligee until another party had signed it as surety, when, in violation of this agreement, and without the knowledge or consent of the surety, the bond was subsequently delivered?

The court below held he could; that the bond so delivered was void as to the surety, and the bill was, therefore, dismissed. From this decree the complainant has appealed.

The subject here presented has provoked much discussion,

which resulted in some conflict of authority. ^{ess} It will be necessary, in order to arrive at a correct conclusion in this cause, to examine with some care not only the cases in our own state in which this question has arisen, but also the decisions of courts outside the state.

It is insisted by the appellee that the decree of the chancellor is fully warranted by the rulings of this court heretofore made. We do not think so. The earliest case in our reports is *Perry v. Patterson*, 5 Humph. 133; 42 Am. Rep. 424. In that case a judgment creditor agreed with his debtor that he would grant him indulgence for twelve months if the latter would give him a note, with two good sureties, for the amount of the judgment. A note was made by the principal debtor, and signed by Perry as surety, but upon the distinct condition the principal would not deliver it to the payee unless another person signed it as cosurety. The principal debtor failed to obtain the additional surety, and, in violation of the condition, and without the knowledge of the surety, he turned the paper over to the attorney of the creditor. This court held that this note was an escrow, and that, having been delivered in violation of the condition making it such, the surety was not bound. In the course of the opinion, in commenting on the facts developed in proof, it is said: "It does not appear that the note was then received by the attorney in payment of the judgment, for he still insisted on having two sureties, as per agreement, and attempted by executions on the judgment to enforce ^{ess} performance, without success." And again the court say: "But we think it obvious from the proof that the note was not delivered to the attorney in execution of the agreement between him and Perry, but merely lodged with him till such time as Francis S. Perry could be induced to sign it. We are constrained to believe that the note has been retained as the last resort, after other mode of enforcing payment had failed." In other words, in that case there was neither a full delivery of the note to, nor a final acceptance of it by, the payee or his agent, and its retention and attempted enforcement against the surety, under the circumstances, was a case of "last resort," and in flagrant violation of his rights.

With these facts fully ascertained it becomes apparent that the statement in the opinion of the court that "it makes no difference, though the attorney did receive the note without the knowledge that it had been conditionally executed

by Simpson Perry; the note was not delivered to the attorney by him, and it was therefore necessary that he should have inquired as to the mode of its execution before he could claim to hold it discharged of the conditions," was unnecessary to the determination of the case, and therefore not binding as authority.

The case of *Carrick v. French*, 7 Humph. 459, simply holds that, to make out an escrow, the evidence must clearly show the surety signed on an express condition, and not upon a casual statement ⁶⁵⁴ of the principal obligee that he intended to place on the paper other sureties, even if it appears that this statement was an inducement to the surety so signing. *Major v. McNeilly*, 7 Heisk. 294, and *Breeden v. Grigg*, 8 Baxi. 163, were cases where the notes in question had been placed in the possession of their respective payees upon an understanding with these payees that they were conditionally delivered, and, in each case, it was properly held that the payees took them subject to the conditions imposed.

These are the Tennessee cases relied upon by the appellee, but we think it apparent that the decree in this case cannot safely rest on their authority.

The case of *Quarles v. Governor*, 10 Humph. 122, while not cited by the appellee, is frequently referred to as an authority for the general rule invoked by the surety in this case, and it is, therefore, proper to refer to it. In that case it was held that a surety on a bond for a sheriff, received, approved, and ordered to be spread on the records of the court, might show, when sued on this bond, he conditionally signed and delivered it to the clerk of the court. The decisions in *Bryan v. Glass*, 2 Humph. 390, *Governor v. Organ*, 5 Humph. 161, and *Ezell v. Justices*, 3 Head, 587, are not in accord with that case, and, as is said in *Amis v. Marks*, 3 Lea, 573, "perhaps announce the safer and better rule." Independent, however, of the question of the right of the surety in a summary proceeding, as that was, to impeach a ⁶⁵⁵ judicial record by parol proof, it may be this case was rested by the court upon the ground that the clerk of the court, who took the bond from the surety with full knowledge of the condition attached, was the statutory agent of the payee of the bond, and that notice to him was notice to his principal. Unless this be so we do not believe the case to be reconcilable with the best considered authorities.

The appellant insists the question before us has been closed

in this state ever since the opinion in *Jordan v. Jordan*, 10 Lea, 124; 43 Am. Rep. 294. That was a suit by a *bona fide* holder of commercial paper, who recovered against a surety undertaking to defend upon the ground of his conditional delivery to the principal debtor, and of the latter's subsequent delivery of the note sued on, in violation of the condition, to the payee. The counsel for appellee, while conceding the soundness of the conclusion reached when confined to the subject of litigation in that case, yet urges that that decision rests upon an exception to the general rule made by the courts in the interest of commerce, and that it cannot be relied upon as authority where the liability of a surety upon a non-negotiable instrument, delivered in violation of like conditions, is called in question. While it is true the case finally rests upon the fact the note sued on was negotiable, and passed, for value, without notice, and before maturity, into the hands of the payee, yet the reasoning and illustrating of the opinion ⁶⁵⁶ embraces both negotiable and non-negotiable paper. The court say: "The law makes the principal the agent of the sureties for the special purpose of delivering the instrument. . . . It is a case for the application of the ordinary principle of agency, that, when the agent is clothed with apparent authority to do the act, he may bind the principal within the limits of that authority, whatever may have been his private instructions." In other words the surety has innocently, but negligently, placed it in the power of his agent to inflict a loss upon another, who is equally innocent, and in no respect guilty of negligence. In such a case the effect of the holding in *Jordan v. Jordan*, 10 Lea, 124, 43 Am. Rep. 294, was, whenever a loss occurred as the result of such negligence, to apply the rule announced in *Lickbarrow v. Mason*, 2 Durn. & E. 21, that, "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it."

Conceding, however, that the announcement of this rule was *dictum* in that case, still the question recurs, Is the rule sound in principle and warranted by authority? That it is sound in principle we have no doubt, and that it should be applied in all cases like the one at bar is sanctioned by the great weight of authority, as we shall now see.

In *State v. Potter*, 63 Mo. 212, 21 Am. Rep. 440, the court says: "Here the surety who ⁶⁵⁷ defends this action had in-

vested the principal with an apparent authority to deliver the bond, and there was nothing on the face of the bond, or in any of the attending circumstances, to apprise the official who accepted it that there was any secret agreement which forbade its acceptance. The surety is alone at fault in the matter, as, but for his unwarranted trust in Turley, the latter would never have had it in his power to occasion the loss which the beneficiaries of this bond must suffer if the defense made by the surety is successful. . . . Surely, then, a more opportune application of the language of Lord Holt, in *Hern v. Nichols*, 1 Salk. 289, could not occur than to the case before us that, 'Seeing somebody must be the loser by the deceit, it is more reasonable that he that employs and puts trust and confidence in the deceiver should be loser than a stranger.'"

In *McCormick v. Bay City*, 23 Mich. 457, where the surety undertook to escape liability on the bond, signed and delivered under similar circumstances, the court says: "It was in his (the surety's) power to insert the names of the desired sureties, and to make the bond joint, and not several. He took none of these precautions. On the other hand, he put it in the power of the principal debtor to get as many or as few sureties as he chose, and to deliver the bond in a shape and under circumstances raising no suspicion." To the same effect are the cases of *Webb v. Baird*, 27 ~~658~~ Ind. 368; 89 Am. Dec. 507; *State v. Garton*, 32 Ind. 1; 2 Am. Rep. 315; *State v. Peck*, 53 Me. 284, and *Millett v. Parker*, 2 Met. (Ky.) 608.

In *Nash v. Fugate*, 24 Gratt. 202, 18 Am. Rep. 640, the court approvingly quotes and adopts the language of Judge Redfield, as follows: "Where the surety intrusts the bond to the principle obligor in perfect form, with his own name attached as surety, and nothing on the face of the paper to indicate that others are expected to sign the instrument, in order to give it full validity against all the parties, he makes such principal his agent to deliver the same to the obligee, because such is the natural and ordinary course of conducting such transactions; and if the principal, under such circumstances, gives any assurances to the surety in regard to other sureties, or performing any other condition which he fails to perform, the surety, giving confidence to these assurances, must stand the hazard of their performance, and he cannot implicate the obligee in any responsibility in the

matter, unless he is guilty of fraud or rashness in accepting the security."

In *Dair v. United States*, 16 Wall. 1, the supreme court of the United States adds the great weight of its sanction to this view, and applies the rule of estoppel *in pais* to a surety in such a case as the one before us, and shows that the case of *Pawling v. United States*, 4 Cranch, 219, which was referred to by the appellee as supporting the opposite view, has been misinterpreted, ⁵⁵⁹ and is, in fact, no authority against the rule announced in the former case.

As against the rule so announced, only a limited number of courts have ranged themselves. In *People v. Bostwick*, 32 N. Y. 445, the opposite rule—that is, the one invoked in this case, and upon which the decree of the chancellor was predicated—was distinctly stated and adopted, but the authority of that case was much weakened, if not effectually destroyed, by the doubt as to its soundness, suggested in *Russell v. Freer*, 56 N. Y. 67. The case of *Smith v. Kirkland*, 81 Ala. 345, is in accord with *People v. Bostwick*, 32 N. Y. 445, but it rests alone on the authority of earlier Alabama cases. In Georgia the same view is taken in *Crawford v. Foster*, 6 Ga. 202; 50 Am. Dec. 327.

We are satisfied to adopt the rule as found in *Dair v. United States*, 16 Wall. 1, and *Nash v. Fugate*, 24 Gratt. 202, 18 Am. Rep. 640, and other similar cases, already referred to as resting on sound principle, and sustained by the weight of authority. We agree with the court in *Nash v. Fugate*, 24 Gratt. 202, 18 Am. Rep. 640, when it says "it is impossible to foresee the mischief of adopting a different rule." For "one obligee, having in his possession an instrument signed by responsible parties, to all appearance complete and valid, may, at any distance of time, be confronted and defeated by a secret parol agreement between the principal obligor and some one of the sureties of the existence of which he had not even a suspicion. How is it possible to provide against these secret agreements? ⁵⁶⁰ How are they to be met and disproved? In the nature of things the obligee can offer no evidence besides the bond, as the knowledge of the condition is generally confined to the principal obligor and his sureties."

It is proper to add that, in all such cases, to give the holder the benefit of the rule here announced, it must affirm-

actively appear, as it does in this case, that he took the instrument in question without notice of its conditional delivery.

The decree of the chancellor is reversed, and the cause is remanded for an account upon the principles of this opinion.

SURETYSHIP—BOND DELIVERED CONTRARY TO CONDITION.—A bond of indemnity purporting to be the bond of the plaintiff in the action, as principal, and two other persons as sureties, stipulating that the parties would save the constable harmless from a claim made to property levied upon by him, though not signed by the principal, is binding upon the sureties, and though the sureties sign on condition that the principal would also sign, and never intended or consented that the bond should be delivered without his signature: *Woodman v. Calkins*, 13 Mont. 363; 40 Am. St. Rep. 449, and note. Where part only of the sureties named in a bond execute it, those who do execute it are bound, unless they sign it upon condition that they are not to be bound unless the other sureties named therein also sign it: *Whitaker v. Richards*, 134 Pa. St. 191; 19 Am. St. Rep. 684, and note. Where a surety signs a bond upon condition that a certain other solvent surety will also sign it, he will be released, if, without his consent, after the bond is complete, but before its approval such other surety is released by the principal: *State v. Allen*, 69 Miss. 508; 30 Am. St. Rep. 563, and note. See the note to *Weir v. Mead*, 40 Am. St. Rep. 51, 52, and the extended notes to *Guild v. Thomas*, 25 Am. Rep. 706, and *Sharp v. United States*, 28 Am. Dec. 679-681.

CRAWFORD v. CARROLL

[93 TENNESSEE, 661.]

EXEMPT PROPERTY, PROCEEDS OF.—A judgment recovered for the negligent killing of animals exempt from execution is also exempt.

T. L. Carty, for the plaintiff in error.

Templeton & Cates, for the defendant in error.

661 BEARD, J. The defendant in error, one Carroll, is the head of a family, and lives in Knox county. He owned but two horses, one of which was negligently killed by the railroad. He instituted suit and recovered a judgment against the road for the value of this horse; and this judgment a garnishing creditor sought, by proper process, to subject 662 to the satisfaction of his debt. This claim was resisted by the owner of the judgment, on the ground that it stood in the room and stead of the horse so killed, and, as the latter was exempt property, the judgment was equally protected by section 2931 of the Milliken and Ventrees code. The circuit judge found, as matter of fact, that the horse in question was exempt, and that the recovery made was for its value,

and, as a matter of law, that this recovery was equally exempt with the property itself, and he therefore discharged the garnishment. The garnishing creditor has appealed, and assigns as error this conclusion of law of the court below.

Was the circuit judge right in holding that the unsatisfied judgment for the value of this exempt property, of which its owner has been involuntarily deprived by a tortfeasor, stood in the place of the property itself, equally entitled to the protection of the exemption law?

This question has already been practically settled by this court. In the case of *Duff v. Wells*, 7 Heisk, 17, it was considered, and, notwithstanding the obscurity of the opinion, growing out of the meagerness of the statement of facts by the reporter, it is sufficiently explicit to show that there was an effort to set off a judgment for a debt against another judgment in the same court for the wrongful taking of exempt property, and it was held that this right of setoff could not be exercised so as to defeat the operation of the exemption laws, it is true, the conclusion of the ⁶⁶³ court was rested, to some extent, upon another consideration than the one now in hand, yet it is apparent that the court was equally controlled by the fact that an application of the doctrine of setoff in that case would "defeat the policy of the law exempting, for the benefit of families, property from execution."

This recognition of the policy of the exemption law, and its invocation by the court, necessarily involved an admission that the judgment for the tortious conversion of exempted property, equally with the property so converted, was under the protection of the statute in question.

The same question was presented to this court in the case of *Hall v. Fulghum*, 86 Tenn. 451, and more distinctly in the later case of *White v. Fulghum*, 87 Tenn. 281. It is true those cases involved homestead exemption rights, but the same policy which has provided a homestead for the poor man, exempt from the reach of his creditors, has dictated the various acts of the legislature providing equal exemption for him in his holding of various articles of personal property, and there can be suggested no sound reason why the rule adopted in one class of cases should not be enforced in the other.

In *White v. Fulghum*, 87 Tenn. 281, a mortgage was foreclosed in the chancery court, at the instance of the mortgagee. In this mortgage the mortgagor and his wife had

waived their homestead right. At the sale, under the foreclosure decree, ⁶⁶⁴ the property realized a sum in excess of the mortgage debt. Judgment creditors of the mortgagor filed their bill to reach this excess, among other grounds, on this, that the foreclosure proceedings extinguished the mortgagor's right of homestead, and left the surplus of the fund subject to the debt of the complainant, as nonexempt property. The court, in its opinion, while conceding that the proceedings in question had extinguished the homestead right in the land itself, adds that "it by no means follows that it extinguished his right of homestead in the proceeds of the land. The mere fact that the land has been converted into money, and that money, as such, cannot be enjoyed as a homestead, does not destroy the right of homestead after it has once attached to the land. The fund realized from the sale of the land represents the land itself, and is subject to the same laws and rights. It stands in the place of the land, and those having an interest in the latter have the same interest in the former."

These cases are decisive of the question at bar. To hold that this involuntary conversion of exempt property into a judgment against the tortfeasor for its value destroyed the quality of immunity from creditors of its owner that inhered by the statute of exemption in the property itself, would be to stick in the bark, and violate the spirit and policy of a wise and beneficent statute.

While unnecessary, it may be proper to add that the rule adopted by this court has met ⁶⁶⁵ the approval of other courts, and is embodied in the text of 1 Freeman on Executions, section 235.

Judgment of the court below is affirmed. The costs of this court will be paid by plaintiff in error and his surety, and of the garnishment proceedings in the lower court by the garnishing creditor.

EXECUTIONS—EXEMPTIONS.—A judgment recovered for the value of exempt personal property is itself exempt from execution: *Wyllie v. Grundy*, 51 Minn. 360; 38 Am. St. Rep. 509, and note.

UNDERWOOD v. SMITH.

[98 TENNESSEE, 637.]

JUDGMENT—MENSURE—LIBEL.—EVERY SEPARATE AND DISTINCT PUBLICATION of a libel gives rise to a separate and distinct cause of action. Therefore, the recovery of damages for a libel published on one day will not preclude plaintiff from maintaining a second action for a republication of the same libel on the day following, though both publications took place before the commencement of the action, unless the plaintiff in that action relied upon, and sought to recover for, the second publication as well as the first.

Henderson & Jourolmon, for the appellant.

Williams, Henderson & Davis, for the appellee.

637 WILKES, J. Defendant, Smith, wrote an article, which was published, at his request, on the evening of April 11, 1892, in the *Knoxville Evening Sentinel*. The same article was republished by the *Knoxville Daily Tribune* on the morning of April 12, 1892.

Soon thereafter plaintiff, Underwood, brought suit against defendant, Smith, for libel, based on the publication in the *Evening Sentinel*. The cause came to a hearing, and resulted in verdict and judgment for the plaintiff for three hundred and forty dollars.

April 6, 1898, the plaintiff brought the present 638 suit against the defendant, Smith, for libel, based on the publication in the *Tribune*. Pleas of *res adjudicata* and not guilty were filed, and the former was sustained by the circuit judge, and plaintiff's suit was dismissed, from which judgment of the circuit judge plaintiff appealed, and has assigned as error the action of the trial judge in sustaining the plea of *res adjudicata*, and in not hearing the cause upon the merits under the plea of not guilty. An agreed statement of facts is made, and it appears that both publications are of identically the same matter, one being made in the *Sentinel* on the evening of April 11th, and the other in the *Tribune* on the morning of April 12th; that the two papers have a number of subscribers in common, but each has subscribers that the other has not.

The circuit judge was in error in sustaining this plea of *res adjudicata*. Every separate and distinct publication of a libel is a distinct offense, for which a separate action will lie, and a recovery of damages for the first publication of the libel is no bar to an action based upon its repetition or

republication: Newell on Defamation, sec. 8, p. 350; Odgers on Libel, sec. 160, p. 277; *Rex v. Carlile*, 1 Chit. 453; Pollock on Torts, 315.

In the action upon the libel in which judgment has heretofore been rendered there is no mention made of repetition or republication of the libelous matter, and it was in nowise involved, and evidence of it would, perhaps, have been inadmissible: *Saunders v. Baxter*, 6 Heisk. 369, 392.

••• The rule which requires a party not to split his cause of action, and prosecute it by piecemeal, does not require that distinct causes of action, each of which would authorize independent relief, should be presented in a single suit. And this is true, even though the several causes of action may exist at the same time: 2 Black on Judgments, sec. 344; *Stark v. Starr*, 94 U. S. 477; *Secor v. Sturgis*, 16 N. Y. 548; *Bender-nagle v. Cocks*, 19 Wend. 207; 82 Am. Dec. 448.

The doctrine of *res adjudicata* is based upon reasons and principles which have no application to the case at bar. In order to sustain the plea the causes of action must be the same, between the same parties, based upon the same evidence, and resulting in damages based on the same reasons.

In the case of these two publications the evidence in the one case would not apply, except in part, to the other case.

The time and fact of publication are different in the two cases. The papers in which the publications are made are not the same. The possible defendants are not the same. In the former case the publisher of the *Sentinel* could have been joined, but not the publisher of the *Tribune*, and *vice versa*.

The parties receiving the publication are not altogether the same; and it may be the damage sustained is not the same in the latter as in the former case. While it is true that one recovery in an action for libel is a bar to a second recovery ••• for the same cause of action, as in all other suits, still it is no bar when there is a separate and distinct cause or ground of action for a repetition of the libel, which is a similar, but not the same, offense, any more than a judgment for one assault and battery would bar an action for a second assault and battery by the same person on the same party.

Townshend, in his work on Slander and Libel, says, in substance: "If one copies the subject matter of a writing upon another piece of material the copy is no more the same subject matter with the original than is a repetition of a sound

the same as the original sound": Townshend on Slander and Libel, sec. 117.

Again, the same writer says: "It is no bar to an action for slander or libel that, in a former action, for the publication of the same words on an occasion different from that alleged in the declaration, the defendant obtained a verdict and judgment in his favor. It was not for the same cause of action": Townshend on Slander and Libel, 4th ed., sec. 251, p. 442.

The judgment of the circuit judge is reversed, and, inasmuch as no evidence on the merits was given under the plea of not guilty (the suit having been dismissed on sustaining the plea of *res adjudicata*), the cause will be remanded to the circuit court, to be further proceeded in on the merits.

The appellee will pay the costs of the appeal.

EVERY UTTERANCE OF SLANDEROUS WORDS IS A DISTINCT CAUSE OF ACTION, and, if recovery is sought for the repetition of a slander, the repetition must be declared upon as a separate cause of action: *Jenn v. Hennessy*, 69 Iowa, 372.

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ACKNOWLEDGMENTS.

1. **IMPEACHING.**—The certificate of acknowledgment of a deed or mortgage of a homestead by a married woman may be impeached, and the instrument avoided, by proving that she never in fact appeared before the officer making the certificate, or acknowledged the deed or mortgage to him. This rule may be enforced against an innocent purchaser without notice. *Grider v. American etc. Mortgage Co.*, 58.
2. **CONCLUSIVENESS—WHEN MAY BE IMPEACHED.**—When a grantor or mortgagor appears before an authorized officer and makes an acknowledgment of the execution of the instrument, which is duly certified by the officer to have been made in conformity to law, his certificate is conclusive of the facts certified, and which he is by law authorized to certify, until successfully assailed for duress or fraud in which the grantee or mortgagee participated, or had notice of before parting with the consideration; but if there was in fact no appearance before the officer, and no acknowledgment, this may be shown, and, when proved, renders the certificate of acknowledgment and the instrument void, even though the grantee or mortgagee is a purchaser for value without notice. *Grider v. American etc. Mortgage Co.*, 58.

ACTIONS.

1. **LEGAL AND EQUITABLE JURISDICTION—JUDGMENT.**—The district courts are courts of general law and equity jurisdiction, in which formal distinctions between law and equity have been abolished, and they have power to administer relief according to the nature of the case, without regard to forms of action. Hence, if to an action seeking legal relief there is an answer praying for equitable relief, and a trial by jury is waived, there can be no valid objection to a judgment granting equitable relief upon the ground that the action was one at law. *Kirkwood v. First Nat. Bank*, 683.

2. **MERGE OF CAUSES.**—The law does not favor a multiplicity of suits, and, where all the matters in controversy between the parties may be fairly included in one action, the law requires that it should be done. *Thieler v. Miller*, 302.
3. **ELECTION OF REMEDY—CONCLUSIVENESS OF.**—An election of a remedy once fairly made by a party having the right to make it is final and irrevocable. *Moline Plow Co. v. Rodgers*, 317.
4. **ELECTION OF REMEDY—CONCLUSIVENESS OF—SALE.**—If the owner of goods delivers them to an agent under a contract authorizing the latter to sell, and retain all the proceeds over a fixed amount, and giving the owner, at a specified time, the right to require of the agent payment of the price fixed for all goods delivered, and such agent absconds, and creditors attach the goods in his possession, the commencement of an action against the agent for the purchase price, by the owner who has a knowledge of these facts, passes the title to the agent. The owner thereby treats the transaction as a sale, and will thereafter be estopped from maintaining an action to recover the property from the sheriff holding it under the writs of attachment. *Moline Plow Co. v. Rodgers*, 317.
5. **APPEARANCE.**—A defendant in a cross-petition who files exceptions in open court to the commissioner's report thereon thereby makes an appearance, and cannot successfully plead that he has not been duly summoned. *Newman v. Moore*, 343.

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ADVERSE POSSESSION.

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See EASEMENTS, 3; GUARDIAN AND WARD, 8; LANDLORD AND TENANT, 1;
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APPEAL.

1. **STIPULATION—RECORD—QUESTIONS NOT REVIEWABLE, WHEN.**—A written stipulation, signed by the counsel for both parties, that the appellee may raise and argue questions of law in the supreme court, and filed after the other party has taken an appeal, is no part of the record, although printed with it; and the appellate court will not consider such questions, particularly where it does not appear of record that they were raised in the trial court, and decided adversely to the appellee. *Mullen v. Reed*, 174.
2. **TRIAL—MOTION FOR CONTINUANCE—DENIAL OF, NOT ERROR, WHEN.**—The denial of a motion for a continuance in a criminal case is not error,

though the defendant was arrested and had a preliminary examination eight days before the trial, and was not assigned counsel until two days before the trial, where no showing is made that the defendant is deprived of the testimony of absent and material witnesses. *State v. Stickney*, 284.

3. **TRIAL—MOTION FOR CONTINUANCE—DENIAL OF MOTION, WHEN.—**It is not error to deny a motion for a continuance in a criminal case where counsel has been assigned to defendant only two days before trial, and he, on the day preceding trial, files an affidavit for a continuance, stating that he has not had sufficient time in which to prepare for trial, and setting forth the testimony of an absent witness, whose testimony he desires, where the state consents that such affidavit may be read as the deposition of the absent witness. *State v. Stickney*, 284.
4. **SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT—REVERSAL OF JUDGMENT—NEW TRIAL.—**The supreme court will not reverse the judgment and grant a new trial because there is an apparent preponderance, or even great preponderance, of evidence against the verdict. Disputed questions of fact will not be retried. *Kansas City etc. R. R. Co. v. Berry*, 278.
5. **EVIDENCE—ADMISSION OF AS ERROR.—**The admission of inadmissible evidence, afterwards stricken out by the court with express direction to the jury to disregard it, is not such error as to cause reversal of the judgment in a criminal case. *State v. Atkinson*, 877.
6. **EVIDENCE—EFFECT OF, WHEN IMPROPERLY ADMITTED.—**The admission of irrelevant and immaterial evidence not affecting the result is not reversible error. *Jasper Trust Co. v. Kansas City etc. R. R. Co.*, 75.
7. **CONFLICTING AND MISLEADING INSTRUCTIONS** are good ground for a reversal of judgment, though the correct rule is announced in one part of the charge. *Carson v. Stevens*, 661.
8. **JURY TRIAL—INSTRUCTIONS.—**If an instruction has been given on a point in controversy in a case it is not error to refuse to repeat it. *Joseph v. Smith*, 571.
9. **DECREE, REVERSAL OF.—**If there is no evidence to support the decree of the trial court it will be reversed on appeal. *Edwards v. Reid*, 607.
10. **JUDGMENT—REVERSAL.—**Error without prejudice is no ground for a reversal of judgment. *Joseph v. Smith*, 571.
11. **ERRORS NOT REVIEWABLE.—**When it appears from the record that a trial was had finally upon the real grounds of controversy between the parties it is not the duty of the appellate court to review preliminary errors committed by the trial court in passing upon the pleadings presented in reaching the real points in contest. *Home Ins. Co. v. Scales*, 512.
12. **JURY TRIAL—DISCHARGE OF JURY.—**While the discharge of a jury before the completion of a trial, without the consent of the accused, and without sufficient reason, ordinarily bars a further trial, yet if, after the commencement of a trial, the question as to the necessity of discharging one of the jurors on account of sickness was heard and determined by judicial methods, and a finding made that a discharge was absolutely necessary, the appellate court cannot say, in the absence of the evidence, upon which the discharge was granted, that there was not good cause for it, or that it should operate as an acquittal. *State v. Reed*, 322.

13. **SALE OF MORTGAGED PREMISES—DISCRETION OF COURT.**—The appointment of a person to make the sale of mortgaged real estate, in an action to foreclose, rests in the sound discretion of the trial court, and, if no abuse is shown, its ruling will not be reviewed. *American Investment Co. v. Nye*, 692.
14. **WAIVER OF OBJECTIONS.**—If the facts established under the pleadings are sufficient to entitle plaintiff to relief in some form of action, and no objection is made by the defendant to his pleadings or at the trial, it is too late on appeal to urge an objection which does not touch the merits, but relates wholly to the form in which the plaintiff has presented the facts and demanded relief, or to the practice and procedure only. *Lough v. Outerbridge*, 712.
15. **FINAL ORDER.—WHAT IS NOT.**—The trial court's denial, in an action of foreclosure, of an application for the appointment of a special master commissioner to make sale of the mortgaged land, is not a final order from which an appeal will lie. Such ruling cannot be reviewed, on appeal, prior to the rendition of a final decree of foreclosure. *American Investment Co. v. Nye*, 692.
16. **REVIEW OF FINDINGS.**—A finding of fact made by a jury or trial judge will not be disturbed by the appellate court if it is supported by competent evidence. *Edwards v. Reid*, 607.
17. **REVERSAL OF JUDGMENT FOR WANT OF FINDINGS.**—If there is no general finding logically covering all of the essential issues in an action, and there is no special finding as to such issues, the judgment must be reversed. *Kirtwood v. First Nat. Bank*, 683.

See INFANTS, 12; JUDGMENTS, 9; NEW TRIAL.

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See ACTIONS, 5; INFANTS, 11, 12.

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See GUARDIAN AND WARD, 1-3.

ARBITRATION AND AWARD.

1. **DEFINITION.**—Arbitration is an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to the established tribunals of justice, and is intended to avoid the formalities, the delay, the expense, and vexation of ordinary litigation. *In re Curtis*, 200.
2. **ARBITRATORS—GRANT OF POWER TO.**—A submission that arbitrators shall proceed upon the principles of equity, to the end that each party may receive all that is justly due him, does not limit the arbitrators, but is a liberal and highly creditably grant of power. *In re Curtis*, 200.
3. **ARBITRATORS ARE NOT OFFICERS.**—When the submission to arbitration is made a rule of court the arbitrators are not officers of the court, but are the appointees of the parties, as in cases where there is no rule of court. *In re Curtis*, 200.
4. **ARBITRATORS—ACTION OF.**—Arbitrators do not act improperly in omitting some detail in their award, which neither the law nor the submission makes it their duty to observe. *In re Curtis*, 200.
5. **MUST CONTAIN WHAT.**—The award must contain the actual decision of the arbitrators, which is the result of their consideration of the various

matters submitted to them; but it need contain nothing else. *In re Curtis*, 200.

6. **ARBITRATORS—FINDINGS OF FACT.**—Arbitrators are not required by law to make findings of fact in the cases decided by them. *In re Curtis*, 200.
7. **ARBITRATORS—PAROL EVIDENCE TO EXPLAIN TERMS USED IN CONTRACT.** Where one of the claims submitted to arbitrators is the alleged breach of a contract to "work" a certain street, parol evidence is admissible to explain the special meaning of this term as understood by the parties at the time the contract was made, and such evidence is not limited to expert testimony. *In re Curtis*, 200.
8. **POWER TO ACCEPT OR REJECT.**—The power given by statute to a court to accept an award implies the power to reject it. *In re Curtis*, 200.
9. **ARBITRATORS—JUDGMENT—CONCLUSIVENESS OF.**—The decision of arbitrators, acting within the scope of their authority, upon matters of fact and law, is conclusive and final, as between the parties to that case, until annulled or reversed on appeal. *In re Curtis*, 200.
10. **ARBITRATORS—DAMAGES.**—When one of the parties to an arbitration claims damages it is within the province of the arbitrators to determine whether they are proximate or remote. *In re Curtis*, 200.
11. **IMPEACHMENT OF.**—The proper practice in impeaching an award rendered upon a submission under rule of court, for any cause, whether apparent upon the face of the award, or for extrinsic causes, is to remonstrate against the acceptance of the award by the court. *In re Curtis*, 200.
12. **EQUITABLE RELIEF AGAINST.**—A court of equity will not set aside an award rendered upon a submission under rule of court when it is within the submission, and there is no claim that the arbitrators failed to act on all matters submitted to them, or that they undertook to act on any matters not submitted, except for partiality and corruption in the arbitrators, mistake on their own principals, or fraud, or misbehavior in the parties. *In re Curtis*, 200.

ARREST.

WHEN UNLAWFUL.—An arrest sought to be made by an officer without a warrant, for a crime not committed in his presence, and when it is doubtful if any crime has been committed, is an unlawful arrest. *Oryer v. State*, 473.

See HOMICIDE, 2, 3.

ASSIGNMENT.

1. **JUDGMENTS—NOTICE TO DEBTOR.**—The assignment of a judgment is valid and effective to vest the title to it in the assignee, so as to defeat a subsequent garnishment of the judgment debtor by a creditor of the assignor having no notice of the assignment before service of the garnishment. *Schoolfield v. Hirsh*, 450.
2. **ASSIGNMENT OF JUDGMENT TO CREDITOR—ACCEPTANCE—EFFECT OF.**—An assignment of a judgment to a creditor, in trust to pay himself and other creditors accepted by such creditor defeats a subsequent garnishment of the debtor by a creditor of the assignor, although the garnishment is served prior to the assent of the other creditors to the assignment. *Schoolfield v. Hirsh*, 450.

3. **ASSIGNMENT IN TRUST—ACCEPTANCE.**—An assignment in trust to a creditor to pay himself and other creditors, accepted by him, implies the assent of the other creditors, and their express acceptance of the assignment is unnecessary. *Schoofield v. Hirsch*, 450.
4. **EQUITABLE ASSIGNMENT.—BILL OF EXCHANGE, OR DRAFT DRAWN GENERALLY,** and not upon any particular fund, whether accepted or not by the drawee, does not operate as an equitable assignment, even when funds have been placed in the drawee's hands as a means of payment. *Commonwealth v. American etc. Ins. Co.*, 844.
5. **EQUITABLE ASSIGNMENT—SIGHT DRAFT—INSOLVENCY OF PAYER.**—A sight draft, drawn generally on a life insurance company by its treasurer to the order of a beneficiary, indorsed by the latter and sent through a bank for collection, but returned unpaid after presentment and refusal to pay shortly before the insurance company is adjudged insolvent and dissolved, is not an equitable assignment of the fund, and gives the beneficiary no preference over the other creditors. *Commonwealth v. American etc. Ins. Co.*, 844.

See **CHAMPERTY**, 1; **REPLEVIN**, 2.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

- AN ASSIGNEE FOR THE BENEFIT OF CREDITORS TAKES THE PROPERTY AND CHOOSES IN ACTION** of his assignor, not as a purchaser for value, but as a volunteer, and therefore subject to all defenses to which they would be subject if in the hands of the assignor. *Akin v. Jones*, 921.

See **BANKS**, 3; **CHECKS**.

ASSOCIATIONS.

1. **HOMESTEAD ASSOCIATIONS—LOANS AND SECURITY.**—When a homestead association makes a loan to one of its members for the use and benefit of a certain corporation, and takes the bond of the member secured by deed of trust from such corporation, the bond and deed of trust are valid and enforceable in the absence of statutory provisions to the contrary. *Kadish v. Garden City etc. Building Assn.*, 256.
2. **LOAN ASSOCIATIONS—ULTRA VIRES.**—When a homestead association makes a loan in good faith to two of its members for the use and benefit of another corporation, and takes the deed of trust of the latter as security for the loan, neither such members nor the corporation can avoid the trust deed under the plea of *ultra vires*, and it may be foreclosed as against them and other creditors of the corporation having notice of the rights of the loan association. *Kadish v. Garden City etc. Building Assn.*, 256.

See **INSURANCE**, 11-17.

ATTACHMENT.

1. **CONFLICT OF LAWS—EXEMPTION—SITUS.**—There is a marked distinction between the *situs* of a chose in action for the purpose of jurisdiction and its *situs* for determining the rights of the parties thereto. Hence, if money is earned in the state of Nebraska by a resident thereof, and is payable there, a proceeding by foreign attachment in the state of Iowa, seizing and applying such earnings to the payment of defendant's debt, must be treated as within the jurisdiction of the Iowa courts, but the *situs* of said earnings for the purpose of determining the right to exemption is Nebraska. *Singer Mfg. Co. v. Fleming*, 613.

2. **CONFLICT OF LAWS—FOREIGN CORPORATIONS.**—If a contract is made, and is performable, in the state of Nebraska, a foreign corporation having a place of business in that state, and which institutes in another state attachment proceedings, and seizes the earnings of a citizen of Nebraska, is subject to the operation of a Nebraska statute exempting such earnings from attachment. *Singer Mfg. Co. v. Fleming*, 618.

See CHATTEL MORTGAGES, 5; PENSIONS; SALES, 7.

ATTAINER.

1. **MURDER—FORMER CONVICTION NO BAR.**—The fact that the accused is a convict under sentence of imprisonment for life for a former murder is no defense for a murder committed by him in prison while serving such sentence. *Singleton v. State*, 488.
2. **PLEA OF AUTREFOIS ATTAINT**, as a bar to a prosecution for another felony of the same grade, is not in force in the United States. *Singleton v. State*, 488.

ATTORNEY AND CLIENT.

See CHAMPERTY; INFANTS, 11.

ATTORNEY'S FEES.

See INFANTS, 13, 14; MARRIAGE AND DIVORCE, 3; NEGOTIABLE INSTRUMENTS, 1, 2; TRUSTS, 8.

AUSTRALIAN BALLOT LAW.

See ELECTIONS, 2.

AUTREFOIS ATTAINT.

See ATTAINER, 2.

AWARD.

See ARBITRATION AND AWARD.

BAILMENT.

See LIENS, 2.

BALLOTS.

See ELECTIONS, 2.

BANKS.

1. **AN INDORSEMENT FOR COLLECTION DOES NOT**, as a general rule, vest title to the property in a bank, and, if the paper passes into the hands of an assignee in insolvency of the bank, the owner may recover it or its proceeds. *Akin v. Jones*, 921.
2. **A COLLECTING BANK IS ENTITLED TO RECEIVE IN PAYMENT** overdrafts and certificates of deposit on itself, and thereby to discharge the debtor. *Akin v. Jones*, 921.
3. **INSOLVENCY.**—If a COLLECTION INDORSED TO A BANK is collected by it, and it afterwards makes an assignment for the benefit of creditors, the relation between it and the owner of the property is that of debtor and creditor, and he cannot impose any trust upon the proceeds in the hands of the assignee, unless there is some agreement or course of dealing whereby the funds were to be held separate, and the identical proceeds

remitted. The existence of such agreement is disproved by evidence showing that the proceeds were directed to be transmitted by a check on another bank. The fact that the payment of the collection was made in overdrafts which were, subsequently to the assignment, paid to the assignee, is not material. *Akin v. Jones*, 921.

4. **NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER.**—A CERTIFICATE OF DEPOSIT as follows: "This certifies that R. K. has deposited in this bank \$3,000, payable to the order of self, in current funds, on return of this certificate properly indorsed. This deposit not subject to check. With interest at six per cent if left six months; no interest after six months," becomes due so as to charge a purchaser with notice of equities at the expiration of six months, and not until then. *Kirkwood v. First Nat. Bank*, 683.
5. **CASHIER, NOTE PAYABLE TO.**—A negotiable instrument made to, and in the name of, a cashier of a bank, of which the bank's money is the consideration, may be sued on in the name of the bank without any indorsement by the cashier. *Lookout Bank v. Aull*, 934.

See CHECKS; TRUSTS, 13.

BENEFIT ASSOCIATIONS.

See INSURANCE, 11-17.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF LADING.

1. **CARRIERS—FALSE BILL OF LADING—RIGHTS OF BONA FIDE PURCHASER.** One to whom a false bill of lading is indorsed and transferred by the person to whom it was issued, and who parts with value and becomes the innocent holder of it without notice, may hold the carrier issuing it responsible for the truth of its recitals, and for damages to the extent he may have advanced on the faith of its genuineness. *Jasper Trust Co. v. Kansas City etc. R. R. Co.*, 75.
2. **CARRIERS—FALSE BILL OF LADING—ESTOPPEL.**—As between a railroad company issuing a false bill of lading and any one who shows himself a *bona fide* transferee and purchaser thereof, the corporation is estopped from denying that it received and holds the goods specified therein. *Jasper Trust Co. v. Kansas City etc. R. R. Co.*, 75.
3. **CARRIERS—FALSE BILL OF LADING—BONA FIDE PURCHASER—DUTY AS TO INQUIRY.**—A *bona fide* purchaser of a false bill of lading is put on inquiry as to the existence of the parties to whom it was issued, and his failure to so inquire and to obtain their indorsement is a bar to any claim for damages against the carrier issuing it. *Jasper Trust Co. v. Kansas City etc. R. R. Co.*, 75.
4. **CARRIERS—FALSE BILL OF LADING—NEGOTIABILITY.**—A false bill of lading, whether indorsed or not, is not a negotiable instrument. *Jasper Trust Co. v. Kansas City etc. R. R. Co.*, 75.
5. **CARRIERS—WHO CAN TRANSFER.**—A bill of lading can be transferred so as to vest title or right in the transferee only by the person to whom it is issued or by his authority. If transferred by an unauthorized stranger the *bona fide* transferee cannot claim any damages from the carrier for the injury he may have suffered thereby. *Jasper Trust Co. v. Kansas City etc. R. R. Co.*, 75.

BONA FIDE PURCHASERS.

See ACKNOWLEDGMENTS; BILLS OF LADING, 1-3, 5; DEEDS, 4; NEGOTIABLE INSTRUMENTS, 4-6.

BONDS.

See GUARDIAN AND WARD, 11; SURETYSHIP, 1.

BRIDGES.

See NEGLIGENCE, 1.

BROKERS.

See VENDOR AND PURCHASER, 5.

BURDEN OF PROOF.

See CARRIERS, 3; DOWER; EVIDENCE, 10; INSURANCE, 10; PAYMENT; TENDER, 2.

BURGLARY.

1. **BREAKING NOT BURGLARIOUS, WHEN.**—A breaking cannot be regarded as burglarious where the entrance to the building is made by the procurement and with the consent of the owner, or by a person acting in his employment; but the fact that the owner participates in decoying the criminal and effecting his arrest is of itself no consent to the commission of the crime. *State v. Stickney*, 284.
2. **DECOY—DEFENSE.**—One who breaks into a building with the intention of committing larceny, and does every act essential to a burglarious breaking, cannot escape responsibility from the fact that there was a detective with, and apparently assisting, him in the commission of the crime. *State v. Stickney*, 284.

CARRIERS.

1. **CARRIERS OF LIVESTOCK—DAMAGES FOR NEGLIGENT DELAY IN DELIVERY.**
A carrier of livestock is liable for all damage that is referable to a negligent prolongation of the transportation through its natural effect upon the physical condition or latent vicious propensities of the animals, whereby they are reduced in strength or weight more than they would have been had prompt carriage and delivery been made, and injure each other in consequence of viciousness, aroused by the excess of their confinement beyond the time necessary for transportation and delivery. *Richmond etc. R. R. Co. v. Trousdale*, 69.
2. **CARRIERS OF LIVESTOCK—EVIDENCE OF CUSTOM.**—In an action against a carrier of livestock to recover for injury to animals caused by negligent delay in transporting them, evidence of a custom making it the duty of the shipper to accompany his stock is not admissible if it does not appear that the performance of such duty would have avoided the injury, or that its remission contributed thereto. *Richmond etc. R. R. Co. v. Trousdale*, 69.
3. **CARRIERS OF LIVESTOCK—PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF.**—If a common carrier, having undertaken to deliver livestock, fails to deliver it in safe condition within a reasonable time, a presumption of negligence arises, and the burden of proof rests on it to excuse itself from negligence and to show that the injury to the stock did not result from the delay. *Richmond etc. R. R. Co. v. Trousdale*, 69.

4. **CONTRACT OF AFFREIGHTMENT, WHERE ENFORCEABLE.**—A contract for the carriage of livestock, entered into with a foreign railroad company operating a line of road within a certain state, by a resident of that state, for transportation of the stock from that state to another, is a contract made in the former state, and may be enforced there. *Richmond etc. R. R. Co. v. Trowdale*, 69.
 5. **A COMMON CARRIER HAS NO RIGHT TO EXACT** from any one any thing that is not reasonable and just, nor to discriminate in favor of one against another, where the conditions and circumstances are the same. *Lough v. Outerbridge*, 712.
 6. **CARRIER'S LAWFUL ACTS TO RETAIN MONOPOLY OF BUSINESS.**—Carriers who have a substantial monopoly of business may lawfully seek to retain their business by offering their services to the public at a loss to themselves whenever competition is to be met, and, when it disappears, resuming their standard rates, if such rates are reasonable and just. *Lough v. Outerbridge*, 712.
 7. **A CARRIER MAY GIVE REDUCED RATES TO CUSTOMERS STIPULATING TO GIVE IT ALL THEIR BUSINESS**, and refuse those rates to others who are not able or willing to so stipulate, provided the charges exacted from those not joining in the stipulation are not excessive or unreasonable. The fact that an offer of reduced rates was made to prevent or drive away competition is not material if such competition is irregular and partial, and the rates charged in the absence of competition are reasonable. *Lough v. Outerbridge*, 712.
 8. **A CARRIER MAY LAWFULLY DEPART FROM THE STANDARD OR USUAL RATES** if such rates are reasonable, and the deviation is in favor of particular customers for special reasons not applicable to the whole public. Special offers in the form of reduced rates to particular customers may form an element in the inquiry, whether, as a matter of fact, the standard rates are reasonable or otherwise. If they are extended to such persons at the expense of the general public that fact must be taken into account in ascertaining whether the tariff of general prices is or is not reasonable. *Lough v. Outerbridge*, 712.
 9. **CHARGES OFFERED TO DESTROY COMPETITION.**—If a common carrier offers to carry goods at a time designated by it at a reduced price, on condition that its customers do not at that time ship any freight by any other line, and to those customers who refuse to agree to give it their exclusive business during such time charges its usual rates, it is not, if the rates charged are just, under the obligation to carry at the reduced rate for those who refuse to assent to the condition upon which those rates are offered. *Lough v. Outerbridge*, 712.
 10. **A COMMON CARRIER IS SUBJECT TO AN ACTION FOR DAMAGES FOR REFUSING TO PERFORM ITS DUTIES** to the public for a reasonable compensation, or to recover back moneys paid when its charges are excessive. *Lough v. Outerbridge*, 712.
 11. **THE DUTIES AND OBLIGATIONS OF CARRIERS MAY BE ENFORCED** through the courts and the legislative power. *Lough v. Outerbridge*, 712.
- See **BILLS OF LADING; DAMAGES, 5; EXPRESS COMPANIES; RAILROADS, 6-13.**

CASHIER.

See **BANKS, 5.**

CAUSA MORTIS.

See GIFTS.

CERTIFICATES OF DEPOSIT.

See BANKS, 4; NEGOTIABLE INSTRUMENTS, 3, 4.

CERTIORARI.

1. SOMETHING MORE THAN THE RECORD IS REMOVED TO THE higher court by the statutory proceedings upon *certiorari* authorized by the laws of New York. It is the duty of the special tribunal whose proceedings are sought to be reviewed to make a return thereof. Therefore, a fact stated in such return may be material, and, if the return in respect to it is false and injurious to the party against whom it was made, he may maintain an action for the damages suffered thereby. *Beardslee v. Dolge*, 707.
2. AN ACTION FOR MAKING A FALSE RETURN to a writ of *certiorari* may be sustained though corrupt methods are not attributable to the defendant. The fact that the proceedings on *certiorari* affirm the judgment or other determination sought to be reviewed does not preclude the party against whom the report was made from showing it was false, if the tribunal to which it was made was bound by it and could not inquire whether it was or not. *Beardslee v. Dolge*, 707.

See JUDGMENTS, 11.

CHAMPERTY.

1. AN ASSIGNMENT OF A NOTE to an attorney, in consideration of his agreement to bring suit thereon at his own costs and expense, and divide with the assignor whatever sum he collects, is champertous and void. *Roberts v. Yancey*, 357.
2. CONSTRUCTION OF STATUTE.—Under a statute providing that all contracts made in consideration of services to be rendered in the prosecution or defense, in or out of court, of any suit by any person not a party on record in such suit, whereby any part of the thing sued for is to be received by such person for his services or assistance, shall be void, it is not necessary that an action should be pending to render the contract champertous and void. *Roberts v. Yancey*, 357.

CHARTERS.

See MUNICIPAL CORPORATIONS, 2-4.

CHASTITY.

See RAPE, 5; SEDUCTION, 1.

CHATTEL MORTGAGES.

1. NATURE OF—NEED NOT BE IN WRITING.—A chattel mortgage, whether in writing or not, is a pledge of personal property to secure the promise of the mortgagor or some one for whom he stands sponsor. It need not be in writing. *Musser v. King*, 700.
2. LEASE, WHEN IS.—A written instrument purporting to be a lease of personal property of a certain value, by which the lessee agrees to pay a certain rental per month for a certain time, and, on default in the

payment of rent, to return the property to the lessor, is a chattel mortgage and not a lease. *Singer Mfg. Co. v. Smith*, 897.

3. **MORTGAGE OR CONDITIONAL SALE.**—If it is doubtful from the face of a written instrument whether a conditional sale or a mortgage is intended the courts generally treat it as a mortgage. *Singer Mfg. Co. v. Smith*, 897.
4. **ACTION TO RECOVER POSSESSION—DEFENSE.**—In an action by a mortgagee to recover possession after condition broken in a chattel mortgage the mortgagor is not entitled to set up a counterclaim for breach of warranty as a defense. *Singer Mfg. Co. v. Smith*, 897.
5. **A mortgage of property to be thereafter acquired is invalid as against purchasers and attaching creditors of the mortgagor.** *Steele v. Ashenfelter*, 694.
6. **TITLE OF MORTGAGEE.**—The mortgagee of chattels is not the owner of the legal title thereto. It is in the mortgagor until divested by foreclosure proceedings and sale in pursuance of the statute. Until then the mortgagee has merely a lien upon the property. *Musser v. King*, 700.

See REPLEVIN, 2, 3.

CHECKS.

BANKS AND BANKING.—A CHECK DRAWN ON A BANK IS NOT AN EQUITABLE ASSIGNMENT, and therefore is not entitled to precedence over an assignment for the benefit of creditors made by the drawer before the check is accepted or presented for payment. *Akin v. Jones*, 921.

CIRCUMSTANTIAL.

See EVIDENCE, 1, 2.

CLOUD ON TITLE.

See EQUITY, 5; HOMESTEAD, 4; LIMITATIONS OF ACTIONS, 1.

COLLATERAL ATTACK.

See GUARDIAN AND WARD, 16; JUDGMENTS, 10, 11.

COMMERCE.

See INTERSTATE COMMERCE.

COMMISSIONERS.

See HIGHWAYS.

COMPENSATION.

See TRUSTS 11.

CONDEMNATION.

See EMINENT DOMAIN.

CONFIRMATION.

See GUARDIAN AND WARD, 13, 16.

CONFLICT OF LAWS.

LAWS OF OTHER STATES.—If the laws of another state determining the rights of the parties are not shown, the laws of this state must be applied. *Miller v. Hyde*, 424.

See ATTACHMENT; CARRIERS, 4; CONSTITUTIONAL LAW, 2; INSURANCE, 12; SALES, 1-3.

CONSIDERATION.

See CONTRACTS, 2, 5, 7; INFANTS, 4, 5.

CONSPIRACY.

EVIDENCE.—After a conspiracy is ended, and its object has been actually reached, the declarations of one conspirator are not admissible in evidence against the others. *State v. Green*, 872.

See HOMICIDE, 1.

CONSTITUTIONAL LAW.

1. **DUE PROCESS OF LAW.**—It is beyond the power of the legislature to restrain a defendant in any suit from setting up a defense to an action against him. Due process of law not only requires that a party shall be properly brought into court, but that he shall have the opportunity, when in court, to establish any fact, which, according to the usages of common law or provisions of the constitution, would be a protection to his property. It is not any process which legislative power may devise. *Larson v. Dickey*, 595.

2. **"FULL FAITH AND CREDIT"—CONFLICT OF LAWS—EXEMPTION LAWS.**—The "full faith and credit" clause of the federal constitution requires not only that full faith and credit shall be given to the judicial proceedings of another state, but also that full faith and credit shall be given to the public acts of such state. Hence, if the exemption laws of the state of Nebraska are disregarded in judicial proceedings in the state of Iowa, and relief is sought by the injured party in Nebraska, such clause does not require the courts of Nebraska to sustain the courts of Iowa in overreaching their jurisdiction. *Singer Mfg. Co. v. Fleming*, 613.

3. **AMENDMENTS TO FEDERAL CONSTITUTION.**—The limitations upon search and seizure imposed by the fourth amendment to the United States constitution, and the fifth amendment thereto providing that no person shall be a witness against himself in a criminal case, have no application to the powers of the state governments. They apply only to the powers of the federal government. Nor has the fourteenth amendment to such constitution, preserving the privileges and immunities of citizens, extended the operation of the first-named amendment to the states. *State v. Atkinson*, 877.

See ELECTIONS, 1; EMINENT DOMAIN, 3; NEW TRIAL, 5; STATUTES, 1, 2, 5-7; TAXES, 1.

CONSTITUTIONS.

See CONSTITUTIONAL LAW.

CONSTRUCTION.

See INSURANCE, 7, 14; STATUTES, 4.

CONTINUANCE

See APPEAL, 2, 3.

CONTRIBUTORY NEGLIGENCE

See RAILROADS, 10.

CONTRACTS.

1. **VENDOR AND PURCHASER—MISREPRESENTATION—DILIGENCE.**—One bargaining with another must use reasonable diligence to discover for himself facts obvious to an ordinary observer, of which the means of knowledge are equally available to both parties. Failing to do this, he cannot maintain an action of deceit for the misrepresentation of them. In the application of this rule the circumstances of each case should be considered to determine whether the plaintiff has been guilty of such inexcusable neglect as to preclude him under the general rule of public policy from having a remedy against one who has fraudulently abused his confidence. *Hale v. Stewart*, 442.
2. **CONSIDERATION.**—A benefit to the promisor is a sufficient consideration for a promise. *Joseph v. Smith*, 571.
3. **FORFEITURE.**—A contract is not unreasonable which stipulates that a sum paid by a purchaser of real property shall be forfeited to the use of the seller on the failure of the former to comply with the residue of the terms of sale. *Donahue v. Parkman*, 415.
4. **CONTRACT BY ONE PERSON TO MAKE ANOTHER HIS LEGAL HEIR**, not in accordance with statute, is not enforceable, and no action lies for its breach. *Davis v. Jones*, 360.
5. **VALIDITY OF WHEN SPRINGING FROM ILLEGAL TRANSACTIONS.**—If an act in violation of law is already committed, a subsequent agreement, which, though founded thereon, constitutes no part of the original inducement or consideration for the illegal act, is valid. *Martin v. Richardson*, 353.
6. **PROMISE OF INDEMNITY—VALIDITY OF.**—A promise of indemnity for the performance of an act not illegal, immoral, or against public policy, is valid. *Smith v. Delaney*, 181.
7. **STATUTE OF FRAUDS—PROMISE TO PAY THE DEBT OF ANOTHER.**—If the leading object of a party who promises to pay the debt of another is to promote his own interests, such a promise, if made on sufficient consideration, is valid, though not in writing. Hence, if one holds the possession of property to secure a lien thereon for a balance of account, but a third party claims a prior lien on the property by virtue of a chattel mortgage, a direct verbal promise by the latter to the former to pay said balance, if the lien claimant will release the property, will support an action against the promisor after such release. *Joseph v. Smith*, 571.
8. **CONTRACT OF INDEMNITY—STATUTE OF FRAUDS.**—A special promise made by one person to another that he will see him "all right" if he will sign the bond of a third person, in order to enable the latter to obtain a license to sell intoxicating liquors, and when the promisor gives as a reason for not signing the bond himself that he intends to go into the liquor business with such third person, is not within the statute of frauds. *Smith v. Delaney*, 181.
9. **PROMISE—STATUTE OF FRAUDS.**—If the inducement for a promise for the performance of an act is a benefit to the promisor which he did not

before or would not otherwise enjoy, and the act is done upon his request and credit, such promise is an original undertaking, and not within the statute of frauds. *Smith v. Delaney*, 181.

See CORPORATIONS, 26-32; GUARANTY; INFANTS, 1-8; INSANE PERSONS, 1; INSURANCE; JOINT STOCK COMPANIES; LOTTERIES.

CONVEYANCES.

See DEEDS; MORTGAGES; VENDOR AND PURCHASER.

CORPORATIONS.

1. **CORPORATION SOLE—POWER TO CREATE.**—One person cannot, under a statute providing that "any number of persons may associate themselves together and incorporate," conduct his ordinary business in the name of a corporation sole formed by himself alone, so as to exempt him from personal liability, or his property not embraced by or used in his corporate business, from the payment of a debt, for no other reason than its being a debt of the corporation. *Louisville Banking Co. v. Eisenman*, 335.
2. **FAILURE TO FILE ARTICLES OF INCORPORATION—EFFECT OF.**—A corporation which has failed to file its articles of incorporation with the county clerk of the county, fixed by its articles of association as its principal place of business, has no valid existence as a *de jure* corporation. *Capps v. Hastings Prospecting Co.*, 677.
3. **SUBSCRIPTION FOR STOCK.**—A writing in substance as follows: "For the purpose of organizing a corporation to bore for gas, we, the undersigned, agree to subscribe and pay for the amount of stock set opposite our names within thirty days from the organization of said corporation," and signed, is a promise to take and pay for the stock of a corporation *de jure*, not of a corporation *de facto*, thereafter to be organized. *Capps v. Hastings Prospecting Co.*, 677.
4. **A CORPORATION DE JURE** is one whose right to exercise a corporate function is invulnerable if assailed by the state in a *quo warranto* proceeding. *Capps v. Hastings Prospecting Co.*, 677.
5. **PROMOTERS OF, DEFINED.**—A "promoter" is a person who organizes a corporation. The word is not a legal, but a business, term, and includes a number of business operations, familiar to the commercial world, by which a company is generally brought into existence. Such a person occupies a fiduciary relation toward the company or corporation whose organization he seeks to promote, and is sometimes called a "trustee." *Yale etc. Stove Co. v. Wilcox*, 159.
6. **PROMOTERS OF, MAY DEAL WITH RESTRICTIONS—FRAUD.**—The "promoter" of a corporation may lawfully deal with his company, but such a transaction must, in all its parts, be open and fair. Suppression, concealment, or misrepresentation of material facts is fraud, which, if proved, will justify a rescission of the contract, or compulsory repayment of secret profits. A "promoter" cannot act both as vendor and purchaser, and in the latter capacity approve a transaction suggested by him in the former. *Yale etc. Stove Co. v. Wilcox*, 159.
7. **VENDOR AND PURCHASER—SECRET CONTRACT—ACCOUNTING.**—Where two or more persons associate themselves for the purpose of purchasing property, and one of them represents to the others that particular property can be bought for a designated price, which he procures to be paid

by his associates, when in fact he receives a difference between said sum and a less one, he may be compelled to account for such difference without any rescission of the contract, and although the property may be worth all or more than was paid for it. This principle applies against promoters of corporations in case of any secret contract more favorable than that disclosed. *Yale etc. Stove Co. v. Wilcox*, 159.

8. **LIABILITIES OF SHAREHOLDERS.**—The sole owner of the stock of a corporation continuing to do business as such is not personally liable on indorsements of drafts made by him in the name of the corporation, when no fraud is practiced and all the parties to the transaction act in the belief that the corporation alone is liable. *Louisville Banking Co. v. Eisenman*, 335.
9. **SUBSCRIPTIONS FOR STOCK—DISTINCTION.**—There is a distinction between the liability of parties for subscriptions to a corporation, or an association which assumes to be and is acting as a corporation, and the liability for subscriptions made by parties for the purpose of organizing a corporation from among the subscribers. *Capps v. Hastings Prospecting Co.*, 677.
10. **LIABILITY OF STOCKHOLDER FOR UNPAID STOCK.**—Failure to pay up all stock of a corporation required to be paid before beginning business does not, in the absence of fraudulent purpose, render one who has become the sole owner of the stock personally liable for corporate debts incurred after the corporation has been doing a prosperous business as such, and when the stock paid in, together with the assets, is amply sufficient to pay all prior existing indebtedness. *Louisville etc. Banking Co. v. Eisenman*, 335.
11. **SHARES OF STOCK—RIGHTS OF STOCKHOLDERS.**—A share of stock may be defined as a right which its owner has in the management, profits, and ultimate assets of the corporation. A stockholder in an insurance company has the same rights as a stockholder in any other corporation; but he has no legal title to the property or profits of the corporation until a dividend is declared, or a division made on the dissolution of the corporation. *Commercial etc. Ins. Co. v. Board of Revenue*, 17.
12. **A SUBSCRIPTION TO THE STOCK OF A PROPOSED CORPORATION MAY BE WITHDRAWN** at any time before its organization by an oral notification of such withdrawal given to another subscriber, who is acting as a member of the committee of subscribers appointed to manage their business, and who has been chosen their president. Notice to the other subscribers is not necessary. *Hudson Real Estate Co. v. Tower*, 379.
13. **A SUBSCRIPTION TO THE STOCK OF A PROPOSED CORPORATION IS REVOKED BY THE DEATH** of the subscriber before it is formed. *Hudson Real Estate Co. v. Tower*, 379.
14. **A SUBSCRIPTION TO THE STOCK OF A PROPOSED CORPORATION MAY BE WITHDRAWN, THOUGH OTHER SUBSCRIBERS** have acted on the strength of the subscription, if the corporation has not been formed. *Hudson Real Estate Co. v. Tower*, 379.
15. **INSOLVENCY OF.**—So long as a corporation is a going concern, engaged in the conduct of the business for which it was organized, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities, it is not in such a state of insolvency as to preclude it from executing a mortgage on its property, in

good faith, to secure a debt of the corporation, though its directors are also liable as sureties or indorsers. *Sabin v. Columbia Fuel Co.*, 756.

16. **INSOLVENCY OF.**—A corporation engaged in the business for which it was organized, although embarrassed and unable to pay its debts at maturity, is not necessarily insolvent, so as to preclude it from preferring one creditor to another by means of a mortgage on its property. *Sabin v. Columbia Fuel Co.*, 756.
17. **WHEN INSOLVENT.**—A corporation is insolvent when its assets are insufficient for the payment of its debts and it has ceased to do business, or has taken, or is in the act of taking, a step which practically incapacitates it from conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue. *Corey v. Wadsworth*, 29.
18. **INSOLVENCY—DIRECTORS AS TRUSTEES—RIGHT TO PREFER THEMSELVES.** The directors and officers of an insolvent corporation are trustees for its creditors, and must manage its property and assets with strict regard to their interests; and if they are themselves creditors, while the insolvent corporation is under their management, they cannot secure to themselves any preference or advantage over other creditors, but must share *pro rata* with them. *Corey v. Wadsworth*, 29.
19. **INSOLVENCY—PREFERENCES IN FAVOR OF OFFICERS OR DIRECTORS.**—A member of the governing body of an insolvent corporation of which he is an unsecured creditor cannot be made a preferred creditor in the administration or disposition of the corporate assets, but such assets must be distributed *pro rata* among all the unsecured creditors, unless valid liens have been created in favor of such member, and then supervening insolvency cannot destroy or impair them. *Corey v. Wadsworth*, 29.
20. **CAPITAL STOCK AS TRUST FUND—POWER OF DIRECTORS OVER.**—The governing body of a corporation holds its capital stock in trust to be preserved and administered primarily for the benefit of creditors, and secondarily for the benefit of the stockholders. *Corey v. Wadsworth*, 29.
21. **INSOLVENCY—ASSETS AS TRUST FUND.**—The entire property of a corporation constitutes a trust fund for the benefit of all its creditors, without preference, only when the affairs of the corporation have reached the point that its managers find themselves obliged to deal with its assets in view of a suspension by reason of its insolvency, but not while it is a going concern, in good faith engaged in the business for which it was organized, although it may be insolvent in fact. *Sabin v. Columbia Fuel Co.*, 756.
22. **CAPITAL STOCK** is the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders for the prosecution of the business of the corporation, and it is a trust fund for the benefit of the corporate creditors. *Commercial etc. Ins. Co. v. Board of Revenue*, 17.
23. **CAPITAL STOCK—POWER OF DIRECTORS OVER.**—The capital stock of a corporation is a trust fund for the benefit and security of the corporate creditors; and the directory or governing body of the corporation are trustees, charged with the duty of guarding the trust fund, and preserving it for the uses for which it was placed in trust. These uses are to meet and discharge the liabilities of the corporation, and to restore to the shareholders, when the corporation is wound up, whatever of the capital stock and accumulated gains may remain on hand after discharging such liabilities. *Commercial etc. Ins. Co. v. Board of Revenue*, 17.

24. **CAPITAL STOCK—POWER OF DIRECTORS TO INVEST—LIABILITY.**—Investment of the stock of a corporation by its directors must be confined within the scope of the corporate powers, and must be done with reference to the interest and success of the corporation. If such stock is misapplied to objects or uses outside the scope of the corporate powers it constitutes a breach of trust, and fastens a personal liability on those who perpetuate the wrong, commensurate with the injury inflicted. Persons receiving stock so misapplied, with notice, make themselves trustees *in invitum*, and liable as such to the corporation. *Commercial Ins. Co. v. Board of Revenue*, 17.
25. **SUBSCRIPTION—ESTOPPEL.**—A subscription for stock to preliminary articles of association not purporting to be a contract with an existing corporation does not estop the subscriber from afterward denying the legal existence of the corporation in a suit upon the subscription. *Capps v. Hastings Prospecting Co.*, 677.
26. **CONTRACT ULTRA VIRES—DEFENSE.**—A corporation having received benefits under a contract made by and with it cannot set up as a defense thereto that it had no power to do business in the state in which the contract was made. *Williams v. Bank*, 503.
27. **ULTRA VIRES AS DEFENSE.**—A corporation cannot avail itself of the defense of *ultra vires* when a contract has been performed in good faith by the other party, and the corporation has had the full benefit of its performance. The same rule holds as to a party who has had the benefit of a contract fully performed by the corporation. *Kadiak v. Garden City etc. Building Assn.*, 256.
28. **ULTRA VIRES—EXECUTORY CONTRACTS.**—While a contract *ultra vires* remains executory, courts interfere to prevent its enforcement, or, on the application of a shareholder or other authorized person, the court prevents its execution, but when it has been carried into effect, and the corporation or the party with whom it contracted has received the benefit of its performance, neither can plead the excess of power in discharge of the liability incurred. *Kadiak v. Garden City etc. Building Assn.*, 256.
29. **PLEA OF ULTRA VIRES SHOULD NOT PREVAIL**, whether interposed for or against a corporation, when it does not advance justice, but accomplishes a legal wrong. *Kadiak v. Garden City etc. Building Assn.*, 256.
30. **CONTRACT ULTRA VIRES FOR MONEY LOANED**, if enforceable at all, is to be enforced as the parties made it, and its terms and provisions must govern their rights. *Kadiak v. Garden City etc. Building Assn.*, 256.
31. **ACTS ULTRA VIRES.**—Acts of corporations spoken of as *ultra vires* are not necessarily unlawful, or even such as the corporation cannot perform, but merely those which are not within the power conferred upon the corporation by its charter, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed, and the funds applied, solely for carrying out the object for which the corporation was created. *Kadiak v. Garden City etc. Building Assn.*, 256.
32. **ULTRA VIRES AS DEFENSE.**—Although a foreign corporation has entered into a contract, in violation of a statute prohibiting it from doing business within the state, it cannot repudiate the contract under the plea of *ultra vires*, and retain the consideration received by it, especially

when the other party is innocent, and ignorant of the fact that the law has been violated. In such case the corporation may be compelled to restore and repay the consideration it has received. *Williams v. Bank*, 503

33. **POWER TO SUBSCRIBE TO STOCK OF ANOTHER CORPORATION.**—A corporation of any nature cannot, either directly, or indirectly, through its agents, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation. *Commercial etc. Ins. Co. v. Board of Revenue*, 17.
34. **POWER TO INVEST CAPITAL STOCK IN STOCK OF ANOTHER CORPORATION.**—An insurance corporation has no authority to invest its capital stock in the stock of another corporation under statutory power to invest its money in "real or personal property, stocks, or choses in action." *Commercial etc. Ins. Co. v. Board of Revenue*, 17.
35. **SUBSCRIPTIONS TO STOCK IN ANOTHER CORPORATION—ULTRA VIRES.** An attempt by the board of directors of a corporation to invest its capital stock in the stock of another corporation is *ultra vires* and void. *Commercial etc. Ins. Co. v. Board of Revenue*, 17.
36. **LIABILITY OF SOLE OWNER OF STOCK.**—The purchase by one stockholder of all the stock in a corporation does not destroy the existence of the corporation. It merely suspends its franchise until the stock may be transferred to others. While in the hands of such purchaser the corporate and individual property are ordinarily alike liable for the debt of such sole owner, and subsequent purchasers of stock take it subject to the liens or equities of the creditors of the sole owner created prior to the transfer of the stock to them, but his individual property is not liable for debts created by him on behalf of, and in the name of, the corporation. *Louisville etc. Banking Co. v. Eisenman*, 335.
37. **DISSOLUTION.**—THE PURCHASE BY ONE STOCKHOLDER OF ALL THE STOCK of a corporation does not dissolve the corporation, and place all the corporate property on the same footing with the other estate of the individual stockholder. *Louisville etc. Banking Co. v. Eisenman*, 335.
38. **EMINENT DOMAIN.**—A FOREIGN CORPORATION may be authorized by the legislature to acquire property by condemnation. *New York etc. R. R. Co. v. Welsh*, 734.
39. **A CORPORATION DOING BUSINESS IN A FOREIGN STATE THEREBY SUBJECTS ITSELF** to the statutes of that state. *Rothrock v. Dwelling-House Ins. Co.*, 418.
40. **CORPORATION DOING BUSINESS IN A FOREIGN STATE—JURISDICTION OF.** If the statutes of a state declare that no foreign insurance company shall do business therein unless it files a stipulation agreeing that process affecting it may be served in a designated manner, and that any corporation or person transacting business without complying with the provisions of the statute shall forfeit certain sums to the school fund, a corporation doing business without complying with the statute does not thereby subject itself to the jurisdiction of the courts of the state, and a judgment against it founded upon service of process on the officer named in the statute is void. The business done is unlawful, and the persons doing it are liable to the penalty imposed by the statute, but the corporation is not brought within the jurisdiction of the courts of the state in the manner in which it would have subjected itself to such

jurisdiction had it complied with the statute. *Redbrook v. Dwelling House Ins. Co.*, 418.

See ASSOCIATIONS; ATTACHMENT; JOINT STOCK COMPANIES; MORTGAGES, 6; RAILROADS; TAXES, 2.

COSTS.

See TENDER, 1.

COTENANCY.

PURCHASE OF TAX TITLE.—A cotenant, whether in or out of possession, cannot buy and hold a tax title against the other cotenants. Such purchase of a tax title merely extinguishes it for the benefit of all the cotenants, and the extent of the right of the purchaser is to charge its cost on the common property. *Cohen v. Hemingway*, 449.

See PARTNERSHIP, 2.

COUNTERCLAIM.

See CHATTEL MORTGAGES, 4.

COUNTIES.

DIVISION OF.—A CRIMINAL PROSECUTION may be commenced and prosecuted after the division of a county in the new county, if the crime was therein committed, though before such division. This remains true even though a prosecution was pending for the same crime in the courts of the late county before the division, if such prosecution was afterwards dismissed, and at the time of the trial and conviction the only proceeding pending was in the new county. *People v. Stokes*, 102.

See NEGLIGENCE, 1.

COURTS.

1. **AMENDMENT OF RECORD.**—There can be no doubt of the general power of a court to amend its records or its process, so as to make them conform to the truth. *Dewey v. Peeler*, 399.
2. **AMENDMENT MAY BE MADE BY A COURT OF ITS RECORDS** and process upon its own motion, or on the suggestion of any one, to conform them to the truth. *Dewey v. Peeler*, 399.
3. **THE RECORD AND PROCESS OF A COURT MAY BE TREATED AS AMENDED**, where, from inspection, the court can see that the error is merely a clerical one, whether it is a record of that court or not. *Dewey v. Peeler*, 399.
4. **AMENDMENT OF RECORD.**—A MOTION TO AMEND A RECORD OR PROCESS of the court may be made and granted in another cause in which such record is offered in evidence to sustain an action had or a sale made thereunder. *Dewey v. Peeler*, 399.

See ACTIONS, 1; ARBITRATION AND AWARD, 3; GUARDIAN AND WARD; JURISDICTION; STIPULATIONS.

COVENANTS.

See PUBLIC LANDS, 1, 2.

CRIMINAL LAW.

1. **EVIDENCE—ANOTHER OFFENSE.**—Testimony tending to show the commission of another offense than the one charged is not, as a general rule, admissible; but, where such offense is intimately connected with the one charged, important proof to establish the latter cannot be excluded because it may tend to prove the former. *State v. Reed*, 322.
 2. **MURDER — INSANITY — INSTRUCTIONS.** — Without evidence suggesting a doubt of the sanity of a person on trial for murder, except the enormity of the crime, the court need not instruct the jury as to his sanity. *Singleton v. State*, 488.
- See **BURGLARY; COUNTIES; GAME LAWS; HOMICIDE; NEW TRIAL, 5; PROCESS, 3; RAPE; SEDUCTION.**

CUSTOM.

See **CARRIERS, 2.**

DAMAGES.

1. **MEASURE OF.—IN ESTIMATING THE DAMAGES RESULTING FROM THE LOSS OF THE LIFE OF A HUMAN BEING** the jury should not be instructed to consider what amount the decedent was able to earn, and was earning, at and before his death, and to decide what he would have earned during the expectancy of his life from the time of his death, and then allow such sum as would reasonably compensate the plaintiff, his widow, for the loss of what he would have earned during such expectancy. The assessment of damages in actions of this character does not admit of fixed rules, and should be left to the sound discretion of the jury, after the court has pointed out the elements proper to be considered. *Railroad v. Spence*, 907.
 2. **NEGLIGENCE—MEASURE OF DAMAGES.**—In action to recover for permanent personal injury arising from negligence the jury should be instructed, in estimating the amount of the damages, to take into consideration the age and situation of the injured party, his earning capacity, and its probable duration, his bodily suffering, and mental anguish resulting from the injury, the loss sustained by the want of the limb injured, and the extent to which he is disabled from making a support for himself by reason of the injury received. *Greer v. Louisville etc R. R. Co.*, 345.
 3. **EARNING CAPACITY AS EVIDENCE.**—In actions to recover for personal injury caused by negligence the plaintiff may prove his previous physical condition and ability to labor, or follow his usual vocation, as well as his condition since the injury, in order to enable the court or jury to properly find the pecuniary damage sustained. *Greer v. Louisville etc R. R. Co.*, 345.
 4. **IN AN ACTION BY A HUSBAND FOR INJURIES TO HIS WIFE RESULTING IN HER MISCARRIAGE** he cannot recover compensation for being deprived of prospective offspring. *Butler v. Manhattan Ry. Co.*, 738.
 5. **CARRIERS OF LIVESTOCK—NEGLIGENT DELAY.—MEASURE OF DAMAGES** against a carrier of livestock for negligent delay in transportation and delivery is the difference in value of the animals at the time they should have been delivered in the condition they would have been at that time and their value when they were delivered in the condition they were at that time; in other words, the damages are measured by
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the change in the condition of the stock wrought by the unreasonable delay, if such change has been wrought. *Richmond etc. R. R. Co. v. Treadale*, 69.

See ARBITRATION AND AWARD, 10; EMINENT DOMAIN, 4-7; INJUNCTIONS, 3; INSURANCE, 18; JUDGMENTS, 8; MALICIOUS PROSECUTION, 2, 4, 5.

DEATH.

See DAMAGES, 1; PARTNERSHIPS, 3-5.

DEBTOR AND CREDITOR.

See FRAUDULENT CONVEYANCES; PARTNERSHIP, 1; TENDER.

DECLARATIONS.

See CONSPIRACY; EVIDENCE, 2, 4, 6.

DECOYING.

See BURGLARY.

DEDICATION.

1. DEDICATION OF STREETS BY REFERENCE TO MAPS—ESTOPPEL.—An owner of a tract of land who conveys lots therein by reference to a name under which the land is platted is not estopped from denying that a certain strip of land therein has been dedicated as a street, simply because a lithographic map in general circulation shows such strip to be a street, if it is not shown that such owner ever knew of, or recognized, such map in making the conveyances, or otherwise. *Lewis v. Portland*, 772.
2. DEDICATION OF STREETS BY MAP OR PLAT.—A landowner who, having made a town plat of a portion of a tract of land showing that a certain strip designated thereon is not a street, afterwards plats an addition, and, for the purpose of showing the relative position of the land last platted to the first, extends the lots, blocks, and streets of the first plat in blank on the addition, showing such strip to be a street, does not thereby dedicate it as a street, as it was not the intention of the owner at the time of filing the additional plat to alter or affect the prior plat or map. *Lewis v. Portland*, 772.
3. DEDICATION OF STREETS—INTENTION.—A dedication of land to a public use, as a street, rests on the intention or assent of the owner, and, when the evidence of such intention rests in parol, it must be so clear and satisfactory as to indicate a positive and unmistakable intention to devote the property to such public use. *Lewis v. Portland*, 772.
4. DEDICATION BY USER.—A user by the public for over twenty years of a passageway to a wharf and warehouse, the owner always controlling, claiming to own, and keeping one end of the way inclosed, does not constitute a dedication to a public use, because such use by the public is not inconsistent with private ownership. *Lewis v. Portland*, 772.

DEEDS.

1. DEED OR WILL—CONSTRUCTION OF WRITING—INTENTION.—Whether an instrument in writing is a deed or a will depends upon the intention of the maker as gathered from the entire language used in the instrument. *Phillips v. Thomas Lumber Co.*, 367.

2. **DEED TO TAKE EFFECT ON GRANTOR'S DEATH.**—An instrument in writing by which the maker deeds specific land to his wife for life, remainder to his grandson, and recites that "this deed is not to take effect" until the grantor's death, he "to have and keep full possession of said farm during his life," is a deed, taking effect upon execution and delivery, and vesting a remainder in the grandson immediately, reserving to the grantor a life estate only, and if the latter, after the deed is recorded, sells and conveys valuable timber standing on the land, the purchaser from him, after his death, is not entitled to enter for the purpose of taking such timber. *Phillips v. Thomas Lumber Co.*, 367.
 3. **VENDOR AND PURCHASER—QUITCLAIM DEED.**—A purchaser of real estate under a quitclaim deed acquires only the interest the grantor has in the property at the time of the conveyance. If the grantor has no interest, none is conveyed by such a deed. *Pleasants v. Blodgett*, 624.
 4. **VENDOR AND PURCHASER—QUITCLAIM DEED—BONA FIDE PURCHASER—WHO IS NOT.**—One who buys real estate under a quitclaim deed from his immediate grantor is not a *bona fide* purchaser as to outstanding and adverse equities and interests against his grantor shown by the record, or which may be discovered by exercising reasonable diligence or making proper examination and inquiry. *Pleasants v. Blodgett*, 624.
- See **ACKNOWLEDGMENTS**, 2, 3; **EXECUTORS AND ADMINISTRATORS**; **GUARDIAN AND WARD**, 11; **INFANTS**, 2, 9; **LANDLORD AND TENANT**, 2, 3; **MORTGAGES**, 1-5.

DEEDS OF TRUST.

See **ASSOCIATIONS**.

DE FACTO.

See **CORPORATIONS**, 3.

DEFAULT.

See **JUDGMENTS**, 7.

DEFEASANCE.

See **MORTGAGES**, 1, 2.

DEFINITIONS.

- Arbitration.** *In re Curtis*, 200.
- Chattel Mortgage.** *Musser v. King*, 700.
- Colonel Mazuma.** *People v. Stokes*, 102.
- "Full faith and credit."** *Singer Mfg. Co. v. Fleming*, 613.
- "Heirs at law."** *Mullen v. Reed*, 174.
- "Householder having a family."** *Pearson v. Miller*, 470.
- "Insolvency."** *Sabin v. Columbia Fuel Co.*, 755.
- "Necessaries."** *Englebert v. Troxell*, 665.
- "Promoter."** *Yale etc. Stove Co. v. Wilcox*, 159.
- "Res gesta."** *Pinney v. Jones*, 209.
- Share of Stock.** *Commercial etc. Ins. Co. v. Board of Revenue*, 17.

DE JURE.

See **CORPORATIONS**, 2-4.

DEMURRER.

See **HOMESTEAD**, 4.

DEVISE.

1. **WILLS—CONSTRUCTION OF DEVISE TO WIFE AND CHILDREN.**—A devise by a testator "to my beloved wife and children," naming them, gives to the persons named a joint and equal interest in the property devised, and not a life interest to the wife, with remainder to the children. *Hazelett v. Farthing*, 365.
2. **WILLS. — A BEQUEST TO A SON OF A SUM OF MONEY TO BE PAID TO HIM WHEN HE SHALL REACH THE AGE OF THIRTY YEARS**, without any provision for the disposition of the money if he should not reach that age, vests the money in him absolutely, but postpones the time when he may receive it, and, in the event of his death before reaching the age, his administrator may maintain an action for the legacy at any time after which the son would have been entitled to it had he survived. *Wardwell v. Hale*, 413.

See **WILLS**, 1.

DIRECTORS.

See **CORPORATIONS**, 18, 19, 23, 24.

DISAFFIRMANCE.

See **INFANTS**, 1-5.

DISCRIMINATION.

See **CARRIERS**, 5, 7-9.

DISQUALIFICATION.

See **JUDGES; JUSTICES OF THE PEACE; TRIAL**, 11.

DISSOLUTION.

See **CORPORATIONS**, 36; **INSURANCE**, 18-20; **PARTNERSHIP**, 3-5.

DISTRIBUTION.

TERM "HEIRS AT LAW" CONSTRUED — INCLUDES WIDOW.—Where personal property is disposed of by an instrument the term "heirs at law" means those persons who are entitled to take under the statute of distribution, unless there is something in the context to indicate a contrary intention. They take in the same manner and in the same proportions as if the property had come to them as intestate estate, unless a contrary intention appears. The term includes a widow. *Mullen v. Reed*, 174.

DIVERSION.

See **WATERS**, 2.

DIVISION.

See **COUNTIES**.

DIVORCE.

See **MARRIAGE AND DIVORCE**.

DORMANT.

See **JUDGMENTS**, 12.

DOWER.

BURDEN OF PROOF.—To entitle a widow to recover dower the burden of proof is on her to show that her deceased husband, during coverture, was seized of a legal or equitable estate of inheritance in the land. *Oebb v. Oldfield*, 263.

DRAFTS

See **ASSIGNMENT**, 4, 5.

DRAINS.

See **WATERS**, 1.

DUE PROCESS OF LAW.

See **CONSTITUTIONAL LAW**, 1.

DUPLICITY.

See **INDICTMENT**, 1.

DYING DECLARATIONS.

See **HOMICIDE**, 7-9.

EASEMENTS.

1. **EASEMENT BY PRESCRIPTION.**—One who, for twenty years, with the knowledge and assent of an adjoining owner, has been permitted to maintain and continue an adverse flow of water in a reservoir on the other's land by means of a dam, thereby acquires a prescriptive easement and right to maintain the dam at a certain height, and may enjoin an interference therewith. *Alcorn v. Sadler*, 484.
2. **EASEMENT BY PRESCRIPTION—INTERRUPTION.**—A person is not deprived of a prescriptive easement to maintain water at a certain height by means of a dam maintained for twenty years, by the fact that he has from time to time strengthened the dam, and has occasionally let off the water at its outlet, these acts not being such an interruption of his enjoyment of the right as to break its continuity. *Alcorn v. Sadler*, 484.
3. **EASEMENT BY ADVERSE USER.**—The period required to acquire an easement in land corresponds to the statute of limitations conferring title by adverse possession. *Alcorn v. Sadler*, 484.

See **PUBLIC LANDS**, 3; **RAILROADS**, 7.

EJECTMENT.

EVIDENCE.—If, in an ejectment suit, the defendant claims title by virtue of a guardian's sale and conveyance, the fact that the required bond in the guardianship proceeding was approved by the judge of the court granting the guardian a license to sell may, like any other fact, be proved by the best evidence attainable. *Myers v. McGarock*, 627.

ELECTION.

See **ACTIONS**, 3, 4; **SALES**, 7; **TROVER**.

ELECTIONS.

1. **CONSTITUTIONAL LAW — ELECTORS — EXCLUDING PERSONS WHO HAVE BORNE ARMS AGAINST THE GOVERNMENT.**—A provision in a state constitution that no person who has ever voluntarily borne arms against

verify it does not affect the jurisdiction of the court or render its proceedings void, especially if it has been verified by the guardian's attorney who conducts the proceedings. *Myers v. McGavock*, 627.

13. **APPEAL—FINDING—CONFIRMATION OF SALE.**—If the court, in its order confirming a guardian's sale of the real estate of his wards, makes a finding that the proceedings of the guardian in making the sale are, in all respects, regular, and in conformity with law, it will be presumed, nothing to the contrary appearing in the record, that there was evidence to justify the finding. *Myers v. McGavock*, 627.
14. **SUFFICIENCY OF DESCRIPTION AS TO PROPERTY SOLD.**—Property sold and conveyed by a guardian was described as "the N. E. two-thirds (2/3) of lot eight (8) in block two hundred and three (203) of the city of Omaha, being all that portion of said lot eight (8) not belonging to the Union Pacific Railway Company." This description, while not very definite, was held not void for uncertainty, but sufficient to identify the property. *Myers v. McGavock*, 627.
15. A guardian's sale of the real estate of his wards, not made by the guardian personally, but through his attorney who conducted the proceedings in court, is not for that reason void. *Myers v. McGavock*, 627.
16. **NOTICE OF SALE—APPEAL, FINDING, AND PRESUMPTION.**—After proper posting of notices of a guardian's sale, and finding by the court that the sale was regular and in conformity with law, it will be presumed, upon a collateral attack, that sufficient evidence was offered to the court, when the sale came on for confirmation, that the notices thereof had been posted as the statute required, and the guardian reported, although no copy of the posted notices was found in the record of the proceedings. *Myers v. McGavock*, 627.

See EJECTMENT; INFANTS, 8-10; RAILROADS, 6, 7.

HABEAS CORPUS.

- IF A COMPLAINT UPON WHICH A CONVICTION HAS BEEN HAD DOES NOT STATE A PUBLIC OFFENSE the prisoner is entitled to his discharge. *Ex parte Maier*, 129.

HANDWRITING.

See WITNESSES, 7, 8.

HEIRS.

See CONTRACTS, 4.

HIGHWAYS.

1. **COURTS AND QUASI-JUDICIAL TRIBUNALS.**—HIGHWAY COMMISSIONERS in laying out a highway exercise a special and limited jurisdiction, and their acts may be impeached by showing that they exceeded their powers. *Beardslee v. Dolge*, 707.
2. A COMMISSIONER OF HIGHWAYS IS NOT A JUDICIAL OFFICER in the sense that he is entitled to protection against a civil action for his misconduct in office. *Beardslee v. Dolge*, 707.
3. HIGHWAY COMMISSIONERS ARE ANSWERABLE in damages, though no corrupt motive can be imputed to them, if they proceeded in a case in which they had no jurisdiction, as when they laid out a road through a yard or inclosure without the consent of the owner thereof, and the

the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government," shall be qualified to vote or hold office in the state "until such disability shall be removed by a law passed by a vote of two-thirds of all the members of both branches of the legislature," does not contravene section 10, article 1, of the constitution of the United States, and is constitutional. *Boyd v. Mills*, 306.

2. "AUSTRALIAN BALLOT LAW"—LEGALITY OF BALLOT ARISING FROM COLOR OF PAPER.—The mere fact that the paper on which all the ballots used in one election district was colored, instead of white, as required by law, is not sufficient to prevent the counting of the votes, where such colored ballots were not only printed by the authorities designated by law, and by them furnished as samples to the judges of election, who used them through an honest mistake instead of white ones, but were the only ballots furnished to or used by any voter at that voting place, as this did not impair that secrecy which is one of the prominent ends sought to be attained by the "Australian Ballot Law." *Boyd v. Mills*, 306.

See EQUITY, 1, 2, 4; INJUNCTIONS, 1.

EMBEZZLEMENT.

See MALICIOUS PROSECUTION, 2, 4.

EMINENT DOMAIN.

1. THE QUESTION WHETHER A NECESSITY EXISTS FOR THE TAKING of private property for the public use is a legislative, and not a judicial, one. *Lynch v. Forbes*, 402.
2. NECESSITY FOR TAKING, WHO MAY DETERMINE.—If the legislature has granted authority to a city or town to take any lands necessary for a designated public use a landowner is not entitled to have the necessity or expediency of the taking in any particular instance submitted to a jury. In the absence of any statute submitting the matter to a court or jury, the decision of the question lies with the body or individuals to whom the statute has delegated the authority to take. *Lynch v. Forbes*, 402.
3. STREETS—DAMAGES FOR GRADING.—Under a provision in a state constitution declaring that private property shall not be taken or damaged for public use without just compensation having first been made, or paid into court for the owner, the proprietor of a lot in an incorporated city may recover for such indirect or consequential damages to his property as he may sustain over and above that sustained by him in common with other proprietors or the public in general. Whenever the enjoyment by plaintiff of some right in reference to the property is interfered with and thereby the property itself made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation. *Eckus v. Los Angeles etc. Ry. Co.*, 149.
4. STREETS.—THE DAMAGES WHICH A LOTOWNER MAY RECOVER FOR GRADING OF A STREET includes all the damages which his lot has sustained by the act of the defendant, and such damage is complete when the grade is changed, and does not depend upon any subsequent use of the lot. *Eckus v. Los Angeles etc. Ry. Co.*, 149.
5. STREETS, DAMAGES FOR GRADING.—If a street, by putting it on the official grade, is cut down in front of a city lot so as to prejudice the

owner in his ingress and egress to and from such lot, any damage sustained by him thereby is peculiar to himself, and independent of any injury sustained by the public generally. For the purpose of determining this damage it is immaterial whether he owns the fee in the street or only an easement for its use. *Eachus v. Los Angeles etc. Ry. Co.*, 149.

6. **STREETS—DAMAGES FOR CHANGING GRADE.**—IT IS ONLY WHEN THE MARKET VALUE of property is diminished by a public use that the property can be said to have sustained such damage as will entitle its owner to compensation. *Eachus v. Los Angeles etc. Ry. Co.*, 149.
7. **STREETS, DAMAGES FOR CHANGE OF GRADE.**—THE SAME RULE IS APPLICABLE WHEN A STREET IS THE FIRST TIME REDUCED TO AN ESTABLISHED GRADE as when a change in the grade has been made after the street has been brought to such grade. In any case, if the cutting results in a damage, rather than a benefit, to a lot, the owner is entitled to compensation for the amount of his damage. *Eachus v. Los Angeles etc. Ry. Co.*, 149.

See CORPORATIONS, 38; RAILROADS, 6, 7.

EQUITABLE ASSIGNMENT.

See ASSIGNMENTS, 4, 5; CHECKS.

EQUITY.

1. **PROTECTION OF POLITICAL RIGHTS.**—A court of equity has no jurisdiction to protect and enforce the right of a voter to cast his ballot in a legal and effective manner, or his right to be a candidate for a particular elective office, or to have an election called and held under the provisions of a valid law, or to have his name printed upon the ballots to be used at such election, so that he may be voted for in a legal manner. Such rights are purely political and must be asserted in a court of law. *Fletcher v. Tuttle*, 220.
2. **PROTECTION OF POLITICAL RIGHTS.**—Wherever established distinctions between equitable and common law jurisdiction are observed courts of equity have no authority to interpose for the protection of rights merely political and when no civil or property rights are involved. In such cases the remedy must be sought in a court of law. *Fletcher v. Tuttle*, 220.
3. **PROTECTION OF POLITICAL RIGHTS.**—The jurisdiction of a court of chancery cannot be invoked to protect the right of a citizen to vote, or to be voted for at an election, or his right to be a candidate for, or to be elected, to, any office, or to restrain the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. Such matters involve no property rights, but pertain solely to the political administration of government. Therefore the remedy must be sought in courts of law. *Fletcher v. Tuttle*, 220.
4. **PROTECTION OF POLITICAL RIGHTS.**—If a public officer charged with political administration has disobeyed, or threatens to disobey, the mandate of the law, whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in his political rights is not without remedy. But the remedy must be sought in a court of law, and not in chancery. *Fletcher v. Tuttle*, 220.

5. **MORTGAGE—REMOVAL OF AS CLOUD ON TITLE.**—A mortgagor who seeks in equity to cancel a mortgage on his homestead as a cloud on his title, on the ground of defects in its execution and acknowledgment, must offer to do equity by refunding the mortgage money with lawful interest. *Grider v. American etc. Mortgage Co.*, 58.
6. **DEFENSE AT LAW.**—If one sued in equity wishes to avail himself of a defense that an adequate remedy exists at law he must plead it. *Lough v. Outerbridge*, 712.
- See **ACTIONS**, 1; **ARBITRATION AND AWARD**, 12; **INJUNCTIONS**; **MARRIAGE AND DIVORCE**, 1; **MAXIMS**; **TRUSTS**, 12; **VENDOR AND PURCHASER**, 10.

ERROR.

See **APPEAL**.

ESTOPPEL.

1. **A MARRIED WOMAN IS ESTOPPED** from interposing her inability to contract, in bar of the consequences of her fraud. *Newman v. Moore*, 343.
2. **ESTOPPEL BY DEED.**—It is only when a party is claiming title under a deed that he is estopped by its recitals, and, if he buys in an outstanding title, he may show that the grantors in the deed did not have the title, and that he holds under a different title, which is paramount. *Cobb v. Oldfield*, 263.
3. **ESTOPPEL BY DEED.**—A party claiming under a deed is estopped from denying any of the material recitals therein, however contrary to the truth, but such estoppel does not apply to or bind those claiming adversely, or to parties claiming by title acquired anterior to the date of the deed which, it is claimed, creates the estoppel. *Cobb v. Oldfield*, 263.

See **CORPORATIONS**, 25; **JUDGMENTS**, 1.

EVIDENCE.

1. **CIRCUMSTANTIAL EVIDENCE IS SUFFICIENT TO SUPPORT A VERDICT** if the jury believe beyond a reasonable doubt, from such evidence, that the accused is guilty. *State v. Atkinson*, 877.
2. **CIRCUMSTANTIAL EVIDENCE TO SUPPORT A VERDICT OF CONVICTION** must be consistent with guilt, and inconsistent with any other reasonable hypothesis, and an instruction to that effect does not submit a question of law to the jury. *State v. Atkinson*, 877.
3. **DECLARATIONS.**—Exceptions to the general rule of evidence which excludes statements made by a party in his own favor ought not to be extended. *Pinney v. Jones*, 209.
4. **DECLARATIONS OF THIRD PERSONS** are not admissible, however closely related in point of time to the principal fact, if they are not in their nature a part of it. *Butler v. Manhattan Ry. Co.*, 738.
5. **RES GESTÆ—DEFINITION.**—*Res gestæ* are the circumstances, facts, and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. *Pinney v. Jones*, 209.
6. **DECLARATIONS—RES GESTÆ.**—A declaration made by a party in his own favor is not admissible in evidence as part of the *res gestæ*, except where the act characterized or explained by such declaration is admissible. *Pinney v. Jones*, 209.
7. **DECLARATIONS—COMPETENCY—RES GESTÆ.**—Where the act characterized or explained by the declaration of a party, and made in his own

favor, is not admissible in evidence, its actual admission, without objection, does not render the accompanying declaration competent. *Pinney v. Jones*, 209.

8. **RES GESTÆ.—PROXIMITY** in point of time with an action which causes an injury does not alone make a declaration or other act a part of the *res gestæ*. It must be a part of the principal act, and so a part of the act itself. Therefore an insulting remark made by a brakeman immediately after inflicting an injury by his negligent act is not admissible against his employer, unless calculated to unfold or qualify the principal act. *Butler v. Manhattan Ry. Co.*, 738.
 9. **STATUTES OF OTHER STATES.—THERE IS NO PRESUMPTION** that the statutes of another state are like those prevailing in this state. *Kelley v. Kelley*, 389.
 10. **LAWS OF ANOTHER STATE—BURDEN OF PROOF.**—If the question of the law of another state is in controversy the party on whom the burden of proof lies will fail, unless he produces evidence to sustain his views; and statutes and decisions which were not put in evidence during the trial cannot be used for the first time in the argument in the appellate court for the purpose of proving the law of another state. *Kelley v. Kelley*, 389.
 11. **NEGLIGENCE—MEASURE OF DAMAGES—LIFE TABLES AS EVIDENCE.**—In an action to recover damages for permanent personal injury arising from negligence, standard life tables are admissible in evidence to show the expectancy of life, and the probable duration of ability to labor, and earning capacity of one of the age of the injured party, as a basis upon which to estimate the amount of damages he should recover. But this proof must be taken subject to the conditions surrounding the individual investigation. *Greer v. Louisville etc. R. R. Co.*, 345.
 12. **SECONDARY EVIDENCE** of the contents of a letter or paper is not admissible where the letter or paper itself is not produced, and its nonproduction is not accounted for. *State v. Reed*, 322.
- See **APPEAL**, 5, 6; **ARBITRATION AND AWARD**, 7; **CRIMINAL LAW**; **EJECTMENT**; **GUARANTY**, 4; **GUARDIAN AND WARD**, 2; **HOMESTEAD**, 10; **HOMICIDE**, 10-14; **LEGISLATURE**; **MASTER AND SERVANT**, 10-16; **MORTGAGES**, 1; **NAMES**, 2; **NEGLIGENCE**, 2-6; **NEW TRIAL**, 6, 7; **RAILROADS**, 16, 19; **SEDUCTION**, 5; **TAXES**, 5-8; **TRIAL**, 3.

EXECUTION.

1. **EXEMPT PROPERTY, PROCEEDS OF.**—A judgment recovered for the negligent killing of animals exempt from execution is also exempt. *Crawford v. Carroll*, 943.
2. **EXEMPTIONS—HOUSEHOLDER.**—An unmarried man who holds and occupies one house as an office and sleeping apartment, while his grandfather, whom he supports, occupies a different dwelling furnished by himself, but owned by the former, who employs and pays a servant to care for his grandfather, all of the parties taking their meals at different places, is not a "householder having a family," so as to exempt his personal property from seizure under execution against him. *Pearson v. Miller*, 470.
3. **EXECUTION, AMENDMENT OF.**—While an execution should follow the judgment, it is clear that an amendment may be allowed if the execution can be so identified with the judgment, and the record on which the judgment is founded, that the court can find *data* on which to make the

amendment. Therefore, an execution in favor of D., as special administrator of the estate of B., may be amended so as to be in favor of D., administrator, with the will annexed, of the estate of B., if such amendment conforms it to the judgment on which it was issued. *Dewey v. Peeler*, 399.

See INJUNCTIONS, 2; PENSIONS; REPLEVIN, 4.

EXECUTORS AND ADMINISTRATORS

POWERS—EXECUTION OF.—DEED BY AN EXECUTOR having an individual interest in land, purporting to convey a complete title thereto, but making no reference to his representative character, or to a power to sell contained in the will, passes only his individual interest. *Coker v. Hemingway*, 449.

EXEMPTIONS.

See ATTACHMENT; CONSTITUTIONAL LAW, 2; EXECUTION; INJUNCTIONS, 2; PENSIONS.

EXPERTS.

See WITNESSES, 5-8.

EXPRESS COMPANIES.

CARRIERS—LIABILITY FOR EMBEZZLEMENT BY AGENT.—When one is induced through the fraud of an express agent to deliver money to an express company, to be carried and delivered to a fictitious person, and such company receives, receipts for, carries, and delivers the money to such agent, who embezzles it, the sender may recover the amount sent from the express company. *Jasper Trust Co. v. Kansas City etc. R. R. Co.*, 75.

FACTORS.

AUTHORITY TO PLEDGE GOODS.—In the absence of express statute a factor or commission merchant has no implied authority to pledge the goods of his principal for his own use. A party so taking the goods and advancing his money acquires no right to the property as against the principal whether he knew he was dealing with a factor or not. *Commercial Bank v. Hurt*, 38.

See PLEDGE, 2.

FELLOW-SERVANTS.

See MASTER AND SERVANT, 3-5, 7, 9-16, 19; RAILROADS, 20, 22.

FINDINGS

See APPEAL, 16, 17; ARBITRATION AND AWARD, 6; TRIAL, 6.

FIRES.

See RAILROADS, 15-17; STATUTES, 5.

FIXTURES.

See MECHANICS' LIENS, 1.

FORECLOSURE

See APPEAL, 13, 15; MORTGAGES, 10, 11; TRUSTS, 6, 8.

FORFEITURE

See CONTRACTS, 3; INSURANCE, 2; VENDOR AND PURCHASER, 8.

FRAUD.

See ESTOPPEL, 1; FRAUDULENT CONVEYANCES, 2; LANDLORD AND TENANT, 3.

FRAUDULENT CONVEYANCES.

1. **RIGHT OF CREDITOR TO TAKE SECURITY.**—A debtor in failing circumstances may prefer one creditor to another by giving him adequate security for his debt, to the exclusion of others. The right to give such preference necessarily implies the right of the creditor to accept it, and, if he accepts it in good faith, without fraudulent purpose on his part, it is not void on account of the motive prompting the debtor to make it. *Sabin v. Columbia Fuel Co.*, 756.
2. **HUSBAND AND WIFE—BURDEN OF PROOF.**—The rule that the party alleging fraud must prove it has no application in a suit between a wife and her husband's creditor, concerning property transferred to her by the husband after the debt was contracted. In such a case the wife must establish, by a preponderance of evidence, the *bona fides* of the transaction. *Carson v. Stevens*, 661.
3. **MORTGAGES—WHEN FRAUDULENT.**—A mortgage designed and made for the benefit of the mortgagor, to enable him to continue in business, by placing his property beyond the reach of legal process, is void as to creditors, although intended in good faith for the ultimate benefit of all the creditors, by preventing a sacrifice of the property. *Sabin v. Columbia Fuel Co.*, 756.
4. **NOTICE TO PURCHASER.**—To invalidate a conveyance upon the ground that it is fraudulent as to creditors it must be proved that the purchaser had notice of such facts tending to show a fraudulent purpose on the part of the grantor as would put a person of ordinary prudence on inquiry, and that the purchaser participated in such purpose. *Edwards v. Reid*, 607.
5. **ANNULMENT OF, BY DECREE, WITHOUT FINDINGS.**—In a suit by a creditor to set aside a conveyance of real estate on the ground that it was made with defendant's knowledge, to defraud the plaintiff, it is error to decree an annulment of defendant's title without either a general or a special finding against him. *Edwards v. Reid*, 607.

See MORTGAGES, 6-9.

FUTURE ADVANCES.

See MORTGAGES, 6.

GAME LAWS.

1. **IN THE EXERCISE OF THE POLICE POWER OF THE STATE** it may prohibit the taking of wild game, and any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good, and to this end may make it criminal for any person to sell, or offer for sale, any such game, whether killed within or without the state. *Ex parte Majer*, 129.
2. **CONSTRUCTION OF AS TO GAME KILLED BEYOND THE STATE.**—If a statute declares that every person in the state who shall at any time sell, or offer for sale, the hide or meat of any deer, elk, antelope, or moun-

tain sheep, shall be guilty of a misdemeanor, its application extends to, and includes, the selling of the hide or meat of any such animals though lawfully killed beyond the state. *Ex parte Maier*, 129.

See INTERSTATE COMMERCE.

GARNISHMENT.

See ASSIGNMENT, 1, 2.

GIFTS.

1. CAUSA MORTIS OR INTER VIVOS.—To constitute a valid gift *inter vivos* or *causa mortis*, the donor must part with the dominion of the property given, and his acts showing his intent to so part with the dominion must be as pronounced and decisive as is possible with the subject matter of the gift. *Jones v. Weakley*, 84.
2. CAUSA MORTIS—SAVINGS BANK BOOK.—The delivery of a savings bank book by its owner to a donee is a valid gift *causa mortis*, if such is the intention of the donor. *Jones v. Weakley*, 84.
3. CAUSA MORTIS—PASS-BOOK OF ORDINARY BANK OF DEPOSIT.—The delivery, by the donor to the donee, of a pass-book of an ordinary bank of deposit only is not sufficient to perfect a gift *causa mortis* of the money on deposit, since a check, and not the bank, is the best delivery, and the depositor, by delivery of the book, does not lose control and dominion over the deposit, and may still check against it. *Jones v. Weakley*, 84.

GRADING.

See EMINENT DOMAIN, 3-7; MUNICIPAL CORPORATIONS, 7; RAILROADS, 3.

GUARANTY.

1. WHAT IS.—If one addresses a letter to another, saying, "If Harry needs more money let him have it, or assist him to get it, and I will see that it is paid," and the person to whom the letter is written acts upon it he is entitled to rely upon the writer only as a guarantor. *Bishop v. Eaton*, 437.
2. CONSTRUCTION OF CONTRACT.—A contract of guaranty will be strictly construed, and, if made with one person or corporation, it cannot be extended to another. Hence, if a contract of guaranty, for goods to be sold to a third party, is made with a corporation which afterwards changes its name and supplies goods after such change, there can be no recovery against the guarantor for the goods so supplied. *Crane Co. v. Specht*, 562.
3. CONTRACT OF, WHEN COMPLETE.—If an offer to guaranty is made in consideration of an act to be done it becomes binding on the doing of the act, so far that the promisor cannot withdraw from his obligation, if within a reasonable time after the acceptance he is notified thereof. *Bishop v. Eaton*, 437.
4. EXTRINSIC EVIDENCE.—If a contract of guaranty is plain, clear, and definite extrinsic evidence is not admissible to vary its terms or meaning. *Crane Co. v. Specht*, 562.
5. AN OFFER OF GUARANTY NEED NOT BE ACCEPTED IN WORDS, OR A PROMISE TO DO ANY THING BEFORE ACTING UPON IT. It is not necessary ordinarily to notify the offerer of the acceptance of the offer. The doing of the act is a sufficient acceptance, and the promisor knows that he is

bound when he sees that action has been taken on the faith of his offer. *Bishop v. Baton*, 437.

6. NOTICE OF THE ACCEPTANCE OF AN OFFER OF GUARANTY must be given within a reasonable time after such acceptance, if it is of such a kind that knowledge of it will not quickly come to the promisor. *Bishop v. Eaton*, 437.
7. NOTICE OF ACCEPTANCE GIVEN BY MAIL AND NOT RECEIVED.—He who makes an offer of guaranty consents that notice of its acceptance may be given in any reasonable way. If he and the party to whom the offer is made are so situate that communication by mail is naturally to be expected, then the deposit of a letter in the mail is all that is necessary, and the miscarriage of the letter and its consequent nondelivery do not make the notice ineffective to charge the guarantor. *Bishop v. Eaton*, 437.
8. NOTICE OF DEFAULT.—One who becomes a surety on a note, relying on the guaranty of a third person that he shall not suffer thereby, is not under obligation to attempt to collect the money from the maker of the note, nor to promptly notify the guarantor of the maker's default, at least in the absence of evidence that the defendant was injured by the delay. *Bishop v. Eaton*, 437.
9. A GUARANTOR IS DISCHARGED BY AN EXTENSION OF THE TIME for payment of the debt, whose payment he guarantees, unless he subsequently ratifies the extension. *Bishop v. Eaton*, 437.

GUARDIAN AND WARD.

1. GUARDIAN AND WARD.—IT IS THE DUTY OF COURTS HAVING AUTHORITY TO APPOINT GUARDIANS to see that they are capable and honest, that they give and keep good the bonds required for the faithful execution of their trust, and that they render, at frequent intervals, accounts of their guardianship. *Myers v. McGavock*, 627.
2. EVIDENCE—CONCLUSIVENESS OF FINDING AS TO GUARDIAN'S APPOINTMENT. On the application of a foreign guardian for leave to sell the real estate of his wards the question as to whether the certified copy of the guardian's appointment is the best evidence, or competent evidence, is one for the court hearing the application, and it is for that court to say whether it is satisfied with the evidence offered to prove that the guardian is the regularly appointed, qualified, and acting guardian of the heirs whose real estate he is making application to sell. Its finding in the matter is conclusive until reversed on appeal. *Myers v. McGavock*, 627.
3. A NATURAL GUARDIAN MAY BECOME THE LEGAL GUARDIAN of his wards, by appointment from the proper authority, acceptance of such appointment, and qualifying as such legal guardian. *Myers v. McGavock*, 627.
4. POWER OF NATURAL GUARDIAN—JURISDICTION.—In the absence of a statute conferring authority on a natural guardian, as such, to dispose of the real estate of his wards, a court has no power to authorize him, as such, to sell the property of his wards. The statute of Nebraska does not empower him to do so. *Myers v. McGavock*, 627.
5. SALE—DUTY OF COURT.—The court should not authorize a guardian to sell the real estate of his wards for their maintenance and education until it has investigated and inquired into all the facts, and is satisfied that such sale is a necessity, or is for the best interests of the wards. *Myers v. McGavock*, 627.

6. **GUARDIAN AND WARD—AUTHORITY OF LEGAL GUARDIAN AS TO SALE—POWER OF COURT.**—The authority of a guardian to sell the real estate of his wards for any purpose must be found in the statute; and, if the statute confers no such authority upon the natural guardian, the only guardian a court has jurisdiction to license to make such a sale is one who has been appointed and commissioned by a court having authority to appoint guardians, and who has accepted such appointment and is qualified and acting. *Myers v. McGarock*, 627.
7. **PETITION FOR SALE—STATUTE INAPPLICABLE—NOTICE.**—The provisions of section 109, chapter 23, of the Compiled Statutes of Nebraska of 1893 are not applicable to a proceeding instituted by a guardian of minors for a license to sell their real estate for their education and maintenance. Hence, it is not necessary, in such a proceeding, to serve notice of the application to sell upon the heirs presumptive of the wards. *Myers v. McGarock*, 627.
8. **PETITION FOR LICENSE TO SELL—ADULT'S INTEREST NOT DIVESTED BY APPEARANCE—SALE AND CONVEYANCE—OUSTER AS TO ADULT'S INTEREST—ADVERSE POSSESSION—LIMITATIONS OF ACTIONS.**—Upon an application by the guardian of minors to sell their real estate, if the mother and an adult brother of such minors enter their appearance and consent that the license to make the sale may be granted, the interest of said widow and adult son in said real estate will not therefore be divested by a sale and conveyance by virtue of such proceedings; but if the proceedings purport to dispose of the interest of the adult parties, and the purchaser enters into exclusive possession, such proceedings and entry will operate as an ouster of such adults, the possession becomes adverse, and, if continued for the statutory period, will divest the title of the adults. *Myers v. McGarock*, 627.
9. **AN APPLICATION BY A GUARDIAN FOR A LICENSE TO SELL THE REAL ESTATE** of his wards for their maintenance and education is a proceeding *in rem*, a proceeding on behalf of the wards, and not adversary to them. Hence, notice to them of such application is not essential to the jurisdiction of the court to grant the license, though it might be otherwise with an application to sell for the purposes of paying debts. *Myers v. McGarock*, 627.
10. **APPLICATION OF FOREIGN GUARDIAN FOR LICENSE TO SELL—JURISDICTION.**—On the application of a foreign guardian to the district court of Nebraska for a license to sell the real estate of his wards, situated in that state, the fact that the guardian's appointment was made in the state of Iowa, if the wards were residing there at the time of such appointment, and that the wards had afterward removed to the state of Illinois, and were residing there at the time of the application in Nebraska to sell, does not deprive him of control over them, or their property, or the court of Nebraska of jurisdiction to grant the license. *Myers v. McGarock*, 627.
11. **BOND ON APPLICATION FOR LICENSE TO SELL—COLLATERAL ATTACK.**—In a collateral proceeding a guardian's deed will not be declared void on the ground that the bond filed by the guardian for the purpose of obtaining the license to sell the real estate of his wards was not formally approved. *Myers v. McGarock*, 627.
12. **VERIFICATION OF PETITION FOR LICENSE TO SELL.**—On the petition of a guardian for a license to sell the real estate of his wards, his failure to

verify it does not affect the jurisdiction of the court or render its proceedings void, especially if it has been verified by the guardian's attorney who conducts the proceedings. *Myers v. McGavock*, 627.

13. **APPEAL—FINDING—CONFIRMATION OF SALE.**—If the court, in its order confirming a guardian's sale of the real estate of his wards, makes a finding that the proceedings of the guardian in making the sale are, in all respects, regular, and in conformity with law, it will be presumed, nothing to the contrary appearing in the record, that there was evidence to justify the finding. *Myers v. McGavock*, 627.
14. **SUFFICIENCY OF DESCRIPTION AS TO PROPERTY SOLD.**—Property sold and conveyed by a guardian was described as "the N. E. two-thirds (2/3) of lot eight (8) in block two hundred and three (203) of the city of Omaha, being all that portion of said lot eight (8) not belonging to the Union Pacific Railway Company." This description, while not very definite, was held not void for uncertainty, but sufficient to identify the property. *Myers v. McGavock*, 627.
15. A guardian's sale of the real estate of his wards, not made by the guardian personally, but through his attorney who conducted the proceedings in court, is not for that reason void. *Myers v. McGavock*, 627.
16. **NOTICE OF SALE—APPEAL, FINDING, AND PRESUMPTION.**—After proper posting of notices of a guardian's sale, and finding by the court that the sale was regular and in conformity with law, it will be presumed, upon a collateral attack, that sufficient evidence was offered to the court, when the sale came on for confirmation, that the notices thereof had been posted as the statute required, and the guardian reported, although no copy of the posted notices was found in the record of the proceedings. *Myers v. McGavock*, 627.

See EJECTMENT; INFANTS, 8-10; RAILROADS, 6, 7.

HABEAS CORPUS.

- IF A COMPLAINT UPON WHICH A CONVICTION HAS BEEN HAD DOES NOT STATE A PUBLIC OFFENSE the prisoner is entitled to his discharge. *Ex parte Maier*, 129.

HANDWRITING.

See WITNESSES, 7, 8.

HEIRS.

See CONTRACTS, 4.

HIGHWAYS.

1. **COURTS AND QUASI-JUDICIAL TRIBUNALS.**—HIGHWAY COMMISSIONERS in laying out a highway exercise a special and limited jurisdiction, and their acts may be impeached by showing that they exceeded their powers. *Beardslee v. Dolge*, 707.
2. A COMMISSIONER OF HIGHWAYS IS NOT A JUDICIAL OFFICER in the sense that he is entitled to protection against a civil action for his misconduct in office. *Beardslee v. Dolge*, 707.
3. HIGHWAY COMMISSIONERS ARE ANSWERABLE in damages, though no corrupt motive can be imputed to them, if they proceeded in a case in which they had no jurisdiction, as when they laid out a road through a yard or inclosure without the consent of the owner thereof, and the

statute prohibited their doing so without such consent. *Beardles v. Dolge*, 707.

See JUDGMENTS, 11.

HOMESTEAD.

1. The extent of a homestead is to be determined by the value of the homestead claimant's interest therein, and not from the fee simple value of the land. *Hoy v. Anderson*, 591.
2. A BUILDING CONSTRUCTED FOR USE AS A HOTEL, and primarily used for that purpose, cannot be selected and held exempt as a homestead, though the debtor and his family occupied it as their home, if his and their residence therein has been for the purpose of maintaining and conducting the business of a hotel, and for no other purpose. *McDowell v. His Creditors*, 114.
3. WILLS, HOMESTEAD RIGHTS UNDER.—A widow who accepts the provisions of the will of her deceased husband disposing of his homestead cannot claim a homestead in the land, and in such case the claim of their children to a homestead is also barred. *Hazelett v. Farthing*, 365.
4. ACTION TO REMOVE CLOUD—PARTIES.—A wife is improperly joined with her husband in an action by him to remove a cloud from the title to a homestead of which he is the sole owner. Such misjoinder may be taken advantage of by demurrer. *Grider v. American etc. Mortgage Co.*, 58.
5. IN CASE A VALID MORTGAGE upon a homestead remains unpaid the mortgagor is entitled, as against subsequent judgment creditors, to the statutory exemption as to value, over and above the amount of the mortgage lien. *Hoy v. Anderson*, 591.
6. JUDGMENT—LIEN.—If one resides upon land as a homestead a judgment recovered against him for a claim which would not bind the homestead, and after the execution and recording of a mortgage upon said land, is not a lien upon the premises, though a transcript of such judgment is filed in the district court of the county in which the real estate is situated. *Hoy v. Anderson*, 591.
7. TO PROVE ABANDONMENT OF A HOMESTEAD there must be shown an intention to abandon it and an actual abandonment. *Edwards v. Reid*, 607.
8. TO ESTABLISH ABANDONMENT OF A HOMESTEAD the evidence must show not only that the party removed from the homestead, but that he did so with the intention of not returning, or that after such removal he formed the intention of remaining away. *Edwards v. Reid*, 607.
9. ABANDONMENT OF.—Removing from a homestead and residing elsewhere temporarily for the purpose of business, health, or pleasure, does not work an abandonment of the homestead unless there is coupled with such removal an intention not to return, or there is formed, after removal, an intention of remaining away. *Edwards v. Reid*, 607.
10. ABANDONMENT OF.—Evidence that a man and wife removed from their farm to a neighboring town in which they lived for several years, and in which the man pursued the business of shoemaking; that they left on the farm the greater part of their household goods and all of their stock and farming utensils; that they put a son in charge of the property; and that the wife divided her time between the farm and her abode in town, doing the laundry work and some of the cooking for herself and husband on the farm, does not show that they left with

the intention of not returning, and their removal to, and residence in, town did not, therefore, work an abandonment of the farm as a homestead. *Edwards v. Reid*, 607.

See ASSOCIATIONS; WILLS, 2.

HOMICIDE.

1. **MURDER—JOINT RESPONSIBILITY—ERRONEOUS INSTRUCTION.**—On the trial of one of two persons charged with murder in resisting arrest, an instruction as to the joint responsibility of the one on trial for the acts of the other is irrelevant and erroneous when no conspiracy is established, and it appears that the one not on trial did not do the killing. *Cryer v. State*, 473.
2. **HOMICIDE—RESISTING ARREST.**—A hostile demonstration of a purpose to use deadly weapons against an arresting posse by an escaped convict and his ally bearing arms, for the unlawful purpose of defying civil authority and preventing arrest justifies the killing of either of them. If, after such demonstration, they kill one of the arresting posse, they are both guilty of murder, irrespective of the question as to whether one or the other of them fired the fatal shot, or as to whether they or the posse fired the first shot. *Tolbert v. State*, 454.
3. **MURDER—MANSLAUGHTER—RESISTING UNLAWFUL ARREST.**—One unlawfully sought to be arrested, who, without malice and to prevent such arrest, kills the party seeking to arrest him, is not guilty of murder, but of manslaughter only. *Cryer v. State*, 473.
4. **MOTIVE.**—On a trial for murder, where the theory of the prosecution is that the crime was committed because of defendant's passion for the wife of the deceased, and of criminal intimacy which existed between them, and of which deceased had knowledge, evidence as to such criminal intimacy is admissible, not only to prove a motive for the killing, but to show the degree or grade of the crime. *State v. Reed*, 322.
5. **INDICTMENT—PRINCIPAL AND ACCESSARY.**—An indictment charging one person with murder, and another as accessory before the fact, contains but one count, and both parties may be convicted thereunder. *State v. Atkinson*, 877.
6. **DEFENDANT AS WITNESS—CROSS-EXAMINATION OF.**—On a trial for murder it is not permissible to cross-examine the defendant, as a witness, about his conduct fifteen years before the homicide, merely for the purpose of proving a previous act of adultery having no connection with the crime charged. *State v. Reed*, 322.
7. **DYING DECLARATIONS.**—A dying declaration uttered under a sense of impending dissolution is admissible in evidence, although death did not immediately ensue, and a hope of recovery was subsequently entertained. *State v. Reed*, 322.
8. **DYING DECLARATIONS.**—After a dying declaration has been admitted in evidence its credibility is entirely within the province of the jury, who are at liberty to weigh all the circumstances under which it was made, including those already proved to the judge, in determining the preliminary question of admissibility, and to give the testimony only such credit as, upon the whole, they may think it deserves. *State v. Reed*, 322.
9. **DYING DECLARATIONS.**—Whether a dying declaration was made under a sense of impending death, and the admissibility of the same, are mat-

- ters exclusively for the consideration of the court, and which it must decide as preliminary questions. *State v. Reed*, 322.
10. **EVIDENCE.**—On a trial for murder any thing that will throw light on the homicide, and every thing that might have influenced the mind of the defendant, may be shown in evidence. *State v. Reed*, 322.
 11. **MURDER—EVIDENCE.**—On a trial for murder a letter proved to be in the handwriting of the accused, though unsigned, expressing an intent to kill, and a motive therefor, and found at the place of the homicide a short time thereafter, is admissible in evidence against the prisoner. *Singleton v. State*, 488.
 12. **EVIDENCE—LETTER OR PAPER.**—It is error on a trial for murder to admit in evidence the contents of a letter or paper which is prejudicial to defendant, and about which statements have been made and introduced in evidence, where such statements were not made in defendant's presence, and where the letter or paper itself is wholly incompetent. *State v. Reed*, 322.
 13. **EVIDENCE.**—On a trial for murder, papers taken from the possession of the accused, without his authority, may be used as evidence against him. *State v. Atkinson*, 877.
 14. **EVIDENCE AS TO CONDUCT OF DECEASED—RES GESTÆ.**—It is error on a trial for murder to admit testimony as to the manner and conduct of the deceased on the day previous to the killing, which were not known to the defendant, which were not connected with the homicide, and which could not, therefore, have influenced the defendant in the commission of the crime. They are not a part of the *res gestæ*. *State v. Reed* 322.
 15. **SELF-DEFENSE.**—A patron, who, finding fault with the service in a restaurant, follows the waiter into the kitchen against the protest of the proprietor, and, after provoking a difficulty, refuses to go out after the waiter has apologized, cannot avail himself of the plea of self-defense in killing the waiter, although the latter advanced upon him with a large carving-knife. In such case it is his duty to retreat if necessary, to avoid killing the waiter, or to prevent himself from being killed. *State v. Trammell*, 874.
 16. **CRIMINAL LAW—SELF-DEFENSE.**—A party who is unlawfully attacked by another may stand his ground, and use such force as reasonably appears necessary to repel the attack and protect himself. He is also justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they are. *State v. Reed*, 322.
 17. **INSTRUCTIONS.**—The defendant having been convicted of murder in the second degree it is immaterial that the court failed to submit an instruction upon manslaughter in the second degree. *State v. Reed*, 322.

See **ATTAINDER**, 1; **CRIMINAL LAW**, 2.

HOTELS.

See **HOMESTEAD**, 2.

HOUSEHOLDER.

See **EXECUTION**, 2.

HUSBAND AND WIFE.

MARRIED WOMEN—LIABILITY UNDER CONTRACT TO CONVEY.—If a married woman refuses to comply with her contract to convey land it may be subjected to the payment of the amount of the purchase price paid by the purchaser, and her assignee of the notes for deferred payments of the purchase price may subject the land to the payment of the amount paid by him for the notes, but no more, the measure of his recovery being the extent to which he is actually injured or damaged. *Newman v. Moore*, 343.

See DAMAGES, 4; FRAUDULENT CONVEYANCES, 2; HOMESTEAD, 4; INSURANCE, 16; MARRIAGE AND DIVORCE; SCIRE FACIAS, 2; WILLS, 2; WITNESSES, 2.

IMPEACHMENT.

See ACKNOWLEDGMENTS, 1; ARBITRATION AND AWARD, 11; HIGHWAYS, 1.

IMPROVEMENTS.

See PARTNERSHIP, 2; SUBROGATION 3.

INDEMNITY.

See CONTRACTS, 6-8; NEGOTIABLE INSTRUMENTS, 9.

INDICTMENT.

1. **DUPLOITY.**—An indictment charging an accused with the commission of a crime, and also his conviction of another and entirely different offense, is not bad for duplicity, if the statute imposes an increased punishment on offenders who have before been convicted of crime. *State v. Moore*, 542.

2. **INFORMATION—INDORSEMENT OF NAMES OF WITNESSES.**—The court does not abuse its discretion by allowing the prosecution to indorse, even upon the day of trial, the names of material witnesses for the state, where it appears that the attention of the defendant and of his attorneys had previously been called to these witnesses, and that inquiry had been made of them as to what their testimony would be. *State v. Reed*, 322.

See HOMICIDE, 5; SEDUCTION, 1, 2; TRIAL, 8, 9.

INDORSEMENT.

See NEGOTIABLE INSTRUMENTS, 7.

INFANTS.

1. **CONTRACTS — RATIFICATION — DISAFFIRMANCE.** — The validity of an infant's contract does not depend upon a ratification thereof by him after his minority ends. It is valid until he, by some act, clear and unmistakable in its character, and within a reasonable time, disaffirms it. *Englebert v. Troxell*, 665.

2. **CONTRACTS—DISAFFIRMANCE—ACTION TO CANCEL DEED.** — Plaintiff's suit to cancel a deed made by him when a minor, and on that ground, is an unequivocal and sufficient disaffirmance of such contract. *Englebert v. Troxell*, 665.

3. **CONTRACTS—DISAFFIRMANCE—REASONABLE TIME.**—What is a reasonable time for an infant, after becoming of age, to disaffirm a contract made by him during his minority is a mixed question of law and fact,

INSOLVENCY.

DEFINITION OF.—Insolvency, in its general and popular meaning, denotes the insufficiency of the entire property of a corporation or individual to pay its or his debts, but, under bankruptcy and insolvency proceedings, it denotes inability to pay debts as they become due in the ordinary course of business. *Subin v. Columbia Fuel Co.*, 756.

See **BANKS**, 1, 3; **CORPORATIONS**, 15-21; **INSURANCE**, 18-20.

INSTRUCTIONS.

See **APPEAL**, 7, 8; **HOMICIDE**; **TRIAL**, 5; **WITNESSES**, 5.

INSURANCE

1. **DIVISIBILITY OF.**—A breach of condition as to part of the property which is subject to a policy of insurance by a change in the title thereto does not avoid the whole policy, though it contains a condition that the entire policy shall become void if any change takes place in the interest, title, or possession of the subject of the insurance. *Trabus v. Dwelling-House Ins. Co.*, 523.
2. **FORFEITURE—DUTY OF INSURER TO PREVENT.**—It is not the duty of the insurer or his agent to keep a policy from becoming forfeited for violation of its conditions by the insured; nor is it the duty of such agent to notify the insured of the forfeiture when it occurs. *Home Ins. Co. v. Scales*, 512.
3. **VACANT PREMISES.**—An insured building is "unoccupied," within the meaning of an insurance policy stipulating that it shall be void if the premises are "vacant and unoccupied" for a certain length of time, in a case where the tenant, who occupies the building as a store, closes and abandons it before the end of the term, leaving therein only a small amount of merchandise of nominal value, although he retains the key to the building at the request of the insured. *Home Ins. Co. v. Scales*, 512.
4. **VACANT PREMISES.**—An insurer is not liable on a policy stipulating that it shall be void if the premises are vacant and unoccupied for a certain length of time, when they have been unoccupied for such period at the time of the fire, although the local insurance agent believed them to be occupied, but did nothing to mislead the insured. *Home Ins. Co. v. Scales*, 512.
5. **CHANGE OF TITLE BY PARTITION.**—A change in the title of property, resulting from its partition among its co-owners avoids a policy of insurance thereon containing a condition that it shall become void if any change other than by death takes place in the interest, title, or possession of the subject of the insurance, whether by legal possession or judgment, or by voluntary act of the assured or otherwise. *Trabus v. Dwelling-House Ins. Co.*, 523.
6. **BUILDING FELLED BY CYCLONE.**—Under a policy of insurance stipulating that if the insured building fall, except as the result of fire, the insurance shall immediately cease, the insurer is not liable for the loss of an insured building felled by cyclone, and destroyed by fire resulting from the fall. *Nichols v. Sun Mut. Ins. Co.*, 465.
7. **POLICIES OF INSURANCE MUST BE LIBERALLY CONSTRUED** in favor of the assured, so as not to defeat, without plain necessity, his claim to indemnity, and, when the words are without violence, susceptible of

two interpretations, that which sustains the loss must, in preference, be adopted. *American Accident Co. v. Reigart*, 374.

8. ACCIDENT INSURANCE.—DEATH CAUSED BY MEAT accidentally passing into, and lodging in, the windpipe while eating is a death through external and violent means, within the meaning of an accident insurance policy limiting recovery to death caused by "external, violent, and accidental means." *American Accident Co. v. Reigart*, 374.
9. ACCIDENT INSURANCE.—UNNATURAL DEATH, the result of accident of any kind, imports an external and violent agency as the cause within the meaning of an insurance policy limiting recovery to death caused through "external, violent, and accidental means." *American Accident Co. v. Reigart*, 374.
10. EVIDENCE—BURDEN OF PROOF—CONCLUDING ARGUMENT.—In an action on an accident insurance policy, the defendant having answered by denial that the death was caused by accident as alleged in the complaint, the burden of proof is on the plaintiff, who is entitled to the closing argument, and the defendant cannot afterwards set up that its denial was bad; that it was entitled to the burden of proof and to the closing argument. *American Accident Co. v. Reigart*, 374.
11. CONTRACT, WHEN SEVERABLE.—A contract or obligation of a beneficial association to pay its members sick benefits of a designated sum each week is severable and not entire. Therefore, a default in the payment of such benefits does not entitle the member in a single action to recover the damages which he may sustain for defaults occurring after the commencement of the action. *Robinson v. Exempt Fire Co.*, 93.
12. BENEFIT ASSOCIATION—LAW OF PLACE.—A contract of insurance in a benefit association should be construed and interpreted according to the laws of the state where the contract was made and was to be performed. *Mullen v. Reed*, 174.
13. BENEFIT ASSOCIATION—BENEFICIARIES.—The money due upon the certificate of a member of a benefit association at the time of his death forms no part of his estate, but belongs to the beneficiaries. *Mullen v. Reed*, 174.
14. BENEFIT ASSOCIATION—CONTRACT OF INSURANCE IN, HOW CONSTRUED. A contract of insurance in a benefit association as shown by its certificate of membership should be construed in accordance with what appears to have been the actual intent of the parties as gathered from the language of the certificate when read in the light of the circumstances under which it is issued. *Mullen v. Reed*, 174.
15. BENEFICIAL ASSOCIATION—SICK BENEFITS ACCRUING AFTER THE COMMENCEMENT OF THE ACTION.—In an action by a member of a beneficial association, who, by the laws of such association, is entitled to sick benefits of a specified sum for each week during which he is sick or disabled, he can recover such benefits accruing to him up to the time of the trial, but is limited to the sum due when his action was brought, though the moneys becoming due pending the action resulted from his disability from the same cause whose operation entitled him to the benefits sued for. *Robinson v. Exempt Fire Co.*, 93.
16. BENEFIT ASSOCIATION—LAW OF PLACE—WIDOW'S RIGHT—"HEIRS AT LAW."—Where a husband is insured in a benefit association organized under the laws of Massachusetts, in which state the contract is made and is to be performed, and the association, in its certificate of membership, agrees "to pay to the heirs at law of said member" a sum of

money in sixty days after proof of his death, and the husband dies domiciled in Connecticut leaving a widow and one child, a minor, and the association pays the amount due, five thousand dollars, to the guardian of such child, and the widow brings an action against the guardian to recover a portion of the money so paid, the contract should be construed according to the laws of Massachusetts, the widow is an "heir at law" within the meaning of that term as used in the certificate of membership, and she is entitled to one-third of the insurance money under the certificate, that being the share of the money that she would take under the laws of that state. *Mullen v. Reed*, 174.

17. **BENEFIT ASSOCIATION—CONSTRUCTION OF TERM "HEIRS AT LAW."**—The term "heirs at law" in the certificate of membership of a benefit association should not be construed in its strict, primary, and technical sense where it is apparent from the language used that the parties intended it to have a more comprehensive and popular meaning. *Mullen v. Reed*, 174.

18. **LIFE INSURANCE—INSOLVENCY—MEASURE OF DAMAGES.**—A life insurance company, when adjudged insolvent and dissolved, has broken its engagement with its policy holders, and becomes liable to them in damages for such breach. The measure of damages is the net value of the policies, without regard to the health of the holder, calculated as of the date of the dissolution of the company, according to the tables of mortality used in the business of life insurance, less the outstanding premium notes, if any. *Commonwealth v. American etc. Ins. Co.*, 844.

19. **LIFE INSURANCE—INSOLVENCY—DISTRIBUTION.**—Auditors appointed to distribute the assets of a life insurance company after it has been adjudged insolvent and dissolved cannot separate mutual policies from ordinary policies in the distribution, if the company has never preserved a separate fund for the payment of mutual policies. *Commonwealth v. American etc. Ins. Co.*, 844.

20. **LIFE INSURANCE—INSOLVENCY OF COMPANY—MATURITY OF POLICIES AFTER DISSOLUTION.**—The beneficiaries in life insurance policies maturing by the death of the insured after the company has been adjudged insolvent and dissolved are not entitled to a dividend on the face value of their policies, but only on the net value thereof calculated as of the date of the decree of dissolution. *Commonwealth v. American etc. Ins. Co.*, 844.

See CORPORATIONS, 11.

INTEREST.

TENDER MADE AND REFUSED, TO STOP INTEREST, must be of the exact amount due, and must be kept good and ready at all times to be paid to the creditor upon his demand, and on plea must be followed by the payment of the money into court. *McCalley v. Otey*, 87.

See NEGOTIABLE INSTRUMENTS, 3; SUBROGATION, 3.

INTERSTATE COMMERCE.

1. **INTERSTATE COMMERCE—TAXATION OF FOREIGN TELEGRAPH COMPANY.**—A state tax imposed upon telegraph companies operating within the state, in lieu of all other taxes, as a privilege tax, its amount being graduated according to the amount and value of the property measured by miles, if reasonable in amount, and especially if less than the *ad valorem* state tax, is valid and not an interference with interstate com-

merce when imposed upon a foreign telegraph company operating its lines in and across the state, although such company is engaged in sending interstate messages. *Postal Telegraph etc. Co. v. Adams*, 476.

2. **GAME LAWS.**—A statute making it criminal for any person to sell, or offer for sale, the hide or meat of certain specified wild animals, though applicable to such animals lawfully killed out of the state, is not invalid as an attempted and forbidden regulation of interstate commerce. At all events, a conviction under the statute may be sustained if the article sold, though imported into the state from another, was not in the original package. *Ex parte Maier*, 129.

See STATUTES, 1.

JOINT LIABILITY.

See HOMICIDE, 1.

JOINT STOCK COMPANIES.

1. **ACTION BY PROMOTER—CONTRACT AGAINST PUBLIC POLICY.**—Where the owner of property is willing to take a certain price for it, a secret contract between such owner and one who undertakes to, and does, organize a joint stock company for its purchase at a much larger sum, wherein it is agreed that the avails of such transaction shall be divided between such owner and "promoter," and which sale and purchase is effected by the aid and influence of said parties as stockholders and directors in said company, is void as against public policy; and no action can be maintained by the "promoter," against the owner to recover the value of the former's alleged share of such avails. *Yale etc. Stove Co. v. Wilcox*, 159.
2. **PROMOTER—SECRET CONTRACT—FRAUD—ACTION BY COMPANY FOR SECRET PROFITS.**—Where the owner of property is willing to take a stated price for it, but enters into a secret contract with the "promoter" of a joint stock company for its purchase at a much larger sum, wherein it is agreed that the avails of the transaction shall be divided between them, and the transaction is consummated by the aid and influence of said parties as stockholders and directors in said corporation, the company may, upon discovering the fraud practiced upon it, sue and recover of such parties the secret profits obtained by them in the transaction, though no offer of rescission be made by the company, and though the property purchased is worth as much or more than was paid for it. *Yale etc. Stove Co. v. Wilcox*, 159.

JUDGES.

1. **DISQUALIFICATION OF.**—A judge is disqualified from acting judicially in a case in which he has any pecuniary interest; but he is not disqualified by reason of having an incidental interest, not pecuniary. *Clyma v. Kennedy*, 294.

JUDGMENTS.

1. **IF THERE IS A WANT OF AUTHORITY** to determine the subject matter of the controversy an adjudication upon the merits is a nullity, and does not even estop the assenting party. *Beardslee v. Dolge*, 707.
2. **PROCESS—JURISDICTION.**—A personal judgment, after default, based upon the service of a summons, in which the law required the defendant to be designated by his true name, but which did not state his

full name, and which was served by leaving a copy thereof at the defendant's usual place of residence, is a nullity, and cannot, if it has become dormant, be revived, as the court acquired no jurisdiction over the defendant. *Enecold v. Olsen*, 557.

3. A JUDGMENT ENTERED WHEN THE PROOF OF THE SERVICE OF PROCESS WAS DEFECTIVE AND INSUFFICIENT is not void if service of such process had in fact been made before a judgment was rendered. It is the fact of service of which gives the court jurisdiction, not the proof of service. *Herman v. Santee*, 145.
4. AMENDED PROOF OF SERVICE OF PROCESS.—If the proof of service of process on file when a judgment is entered is insufficient, and a motion is made to vacate such judgment because of that insufficiency, the plaintiff may meet such motion by a counter-motion to be permitted to file, *anno pro tunc*, as of the date of the judgment, amended proof of such service, and, his motion being granted on the proof filed, the motion to vacate the judgment should be denied. *Herman v. Santee*, 145.
5. THE JUDGMENT OF A COURT OF ANOTHER STATE WILL NOT BE PRESUMED TO BE WITHIN ITS JURISDICTION where such jurisdiction, if it existed, must have been conferred by statute, and there is no evidence of such statute, or, if the statute existed, that the court acted within the jurisdiction given by it. *Kelley v. Kelley*, 389.
6. JUDGMENT—MISTAKE IN NAME.—A judgment against "F. Olsen, full name unknown," is void as a judgment against "Ferdinand Olsen," if the summons in the case was not personally served on him. *Enecold v. Olsen*, 557.
7. JUDGMENT WITHOUT ENTRY OF DEFAULT.—The only purpose of the entry of a default is to limit the time during which the defendant may file his answer, and, as that time never extends beyond trial and judgment, a judgment rendered without any entry of default is neither void nor erroneous. *Herman v. Santee*, 145.
8. ERRONEOUS IN PART—DAMAGES—NEW TRIAL.—If the only error in a judgment is in the assessment of damages, and a new trial is ordered, it will be confined to a reassessment of the damages. *Chyma v. Kennedy*, 194.
9. GOOD IN PART, BAD IN PART—VALIDITY OF—APPEAL.—When a judgment is not an entirety and is good in part, but erroneous in part, it will, on appeal, be set aside only as to the erroneous part where the two parts are separable. *Chyma v. Kennedy*, 194.
10. FINDING AND JUDGMENT—COLLATERAL ATTACK.—The finding and judgment of a court cannot be successfully assailed as void, in a collateral proceeding, on the ground that the court made such finding or rendered such judgment on incompetent evidence. *Myers v. McGavock*, 627.
11. COLLATERAL ATTACK UPON.—An action against highway commissioners for making a false return to a writ of *certiorari* is in the nature of a collateral attack upon their proceedings, and such an attack can be made if they had no jurisdiction. *Beardslee v. Dolge*, 707.
12. JURISDICTION—JUDGMENT BY CONFESSION—WARRANT OF ATTORNEY—NEGOTIABLE INSTRUMENTS.—A judgment on a promissory note, entered in one state by confession under a warrant of attorney, is valid in a sister state, although the defendant may, at the time of the rendition of the judgment, have been absent from the state where the contract

was executed, and a resident of another state. *Kitchen v. Bellefontaine Nat. Bank*, 282.

13. **JUDGMENTS BY CONFESSION BEFORE MATURITY OF DEBT—SUFFICIENCY OF WARRANT OF ATTORNEY.**—A warrant of attorney to confess judgment reciting that in consideration thereof we do hereby make, constitute, and appoint a certain person named to be our true and lawful attorney, for us and in our name, to appear before any court of record and at any time after the date hereof, to waive service of process and confess judgment against us, or either of us, and in favor of the holder of this note, for as much as appears to be due according to date and tenor hereof, is sufficient to authorize the confession of judgment thereon, before the maturity of the note. *Farwell v. Huston*, 237.
14. **JUDGMENTS BY CONFESSION—RENDERED IN OPEN COURT OR IN VACATION.**—There is a broad distinction between cases wherein judgment is confessed in open court and cases where it is confessed in vacation. In the latter case the authority of the attorney must affirmatively appear while in the former the presumption is in favor of the validity of the judgment. *Farwell v. Huston*, 237.
15. **JUDGMENTS BY CONFESSION—WHO MAY OBJECT.**—A warrant of attorney to confess judgment executed by two parties in their individual names, if not sufficient to authorize the confession of judgment against them in their firm name, can only be objected to by them, and not by the creditors of the firm. *Farwell v. Huston*, 237.
16. **JUDGMENTS BY CONFESSION—WHO MAY OBJECT TO.**—A third party has no right to object to a judgment by confession, on the ground that it was confessed without any authority from the judgment debtor. This right belongs alone to the latter. *Farwell v. Huston*, 237.
17. **JUDGMENTS BY CONFESSION—RELIEF.**—A court of law exercises equitable jurisdiction over a judgment by confession, and if there is an absence of authority to confess, the debtor is not forced into a court of equity to obtain relief, but may move to set aside the judgment before the court of law which rendered it; such court may open the judgment and permit the debtor to present his defense if he have any, and at the same time protect the creditor, by permitting the judgment to stand as security. *Farwell v. Huston*, 237.
18. **PRACTICE—ARREST OF JUDGMENT.**—An objection that a cause of action is defectively stated in the complaint cannot be urged on motion in arrest of judgment. *Western Stone Co. v. Whalen*, 244.
19. **DORMANT JUDGMENT, REVIVAL OF—DEFENSE.**—In proceedings to revive a dormant judgment the defense may be interposed that the judgment is void, because the court pronouncing it had no jurisdiction over the person of the defendant, if such lack of jurisdiction affirmatively appears from the record of such judgment. *Enewold v. Olsen*, 557.

See **ARBITRATION AND AWARD**, 9; **ASSIGNMENT**, 1, 2; **EXECUTION**; **INFANTS**, 10, 12; **NEW TRIAL**, 8; **SCIRE FACIAS**, 1; **TIME**, 1; **TROVER**; **TRUSTS**, 10.

JURISDICTION.

1. **JURISDICTION.**—If the proceedings of a court of general jurisdiction are according to the course of the common law they are presumed to be regular. *Kelley v. Kelley*, 389.
2. **JURISDICTION OF THE COURT OF ANOTHER STATE TO ENTER A JUDGMENT MAY ALWAYS BE INQUIRED INTO**, and if the judgment was entered

without jurisdiction it will not be enforced in this state. *Kelley v. Kelley*, 389.

2. **SUBMISSION TO, WHAT IT.**—If a defendant, though not served with process, takes such a step in the action, or seeks such relief at the hands of the court, as is consistent only with the hypothesis that it had jurisdiction, he thereby submits himself to the jurisdiction of the court, and is bound by its action as if he had been regularly served with process. *Childs v. Lanterman*, 121.

See **EQUITY; GUARDIAN AND WARD**, 10; **JUDGMENTS**, 2, 3, 5, 19; **MARRIAGE AND DIVORCE**, 2.

JURY AND JURORS.

See **APPEAL**, 12; **LIBEL**, 2; **TRIAL**, 7, 11.

JUSTICES OF THE PEACE.

DISQUALIFICATION OF.—A justice of the peace is not disqualified from trying and sentencing one who has published a newspaper libel against him. *Olyms v. Kennedy*, 194.

LANDLORD AND TENANT.

1. **TITLE BY PRESCRIPTION.**—Whenever the relation of landlord and tenant is terminated by any hostile act such as the conveyance of the lands demised by the tenant for years, during his term, to another in fee simple by deed duly recorded, it is the duty of the landlord to protect his title by regaining possession; and the open, adverse, and continuous possession of the purchaser from the tenant or those claiming through him, under a claim of title for twenty years, raises a legal presumption of a grant from the true owner in fee, which can only be rebutted by positive proof. Such presumption is independent of the statute of limitations, and applies to subjects not within or expressly excluded from the operation of such statute. *Trustees v. Jennings*, 854.
2. **CONVEYANCE BY TENANT—NOTICE.**—Recording a fee simple deed to demised land, executed by a tenant for a term of years, is notice to the landlord of the execution of the deed when the grantee goes into possession thereunder. *Trustees v. Jennings*, 854.
3. **CONVEYANCE IN FEE** of the demised premises by a tenant for a term of years is a fraud upon the landlord, and gives him the right to recover possession of the land, by action at any time within twenty years immediately following the execution of the deed. *Trustees v. Jennings*, 854.

LARCENY.

See **BURGLARY**.

LEASE.

See **CHATTEL MORTGAGE**, 2; **LANDLORD AND TENANT**.

LEGACY.

See **DEVISE**, 2.

LEGISLATURE.

THERE ARE FIXED BOUNDS TO THE POWER OF THE LEGISLATURE OVER THE SUBJECT OF EVIDENCE which must not be exceeded. As to what

shall be evidence, and who shall assume the burden of proof, its power is unrestricted so long as its rules are impartial and uniform; but it has no power to establish rules which, under pretense of regulating evidence, altogether prohibit a party from exhibiting his rights. *Larson v. Dickey*, 595.

See CONSTITUTIONAL LAW, 1; EMINENT DOMAIN, 1, 2; TAXES, 1, 5-8.

LETTERS.

See HOMICIDE, 11-13; WITNESSES, 2.

LIBEL.

1. JUDGMENT—MERGER.—EVERY SEPARATE AND DISTINCT PUBLICATION of a libel gives rise to a separate and distinct cause of action. Therefore, the recovery of damages for a libel published on one day will not preclude plaintiff from maintaining a second action for a republication of the same libel on the day following, though both publications took place before the commencement of the action, unless the plaintiff in that action relied upon, and sought to recover for, the second publication as well as the first. *Underwood v. Smith*, 946.
2. JURY AS JUDGES OF LAW AND FACT.—By express provision of the statute in Kansas, in all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact. *State v. Whitmore*, 288.
3. READING FROM LAW BOOKS.—In arguing a libel case counsel for the defendant has the right, in discussing the law freely, to read to the jury from authorities, subject, of course, to the supervision of the court and such restrictions as are clearly necessary and proper; and it is error for the court to deny this right. *State v. Whitmore*, 288.

See JUSTICES OF THE PEACE.

LICENSE.

WATERS—PAROL LICENSE TO DIVERT—REVOCATION.—A parol license to dig a ditch and divert water for irrigation purposes cannot be revoked by the licensor or his grantee with notice after labor and money have been expended in pursuance thereof by the licensee. *McBroom v. Thompson*, 806.

LIENS.

1. POSSESSION.—It is indispensable to the existence of a common-law lien that the claimant should have an independent and exclusive possession of the property. *Fitzgerald v. Elliott*, 812.
2. BAILMENT—POSSESSION—TRESPASS AGAINST SHERIFF.—A servant who cuts and skids logs for his employer on land in the possession of the latter is not a bailee, and has no such independent possession as to create a common-law lien upon the logs for his money and labor expended. He cannot maintain trespass against a sheriff to recover damages for the seizure and sale of the logs. *Fitzgerald v. Elliott*, 812.
3. LIENS FOR LABOR—TRESPASS AGAINST SHERIFF.—One who has a statutory lien upon personal property for labor expended cannot maintain trespass against a sheriff to recover damages for levying upon and selling the property, but must look to the fund realized by the sale. *Fitzgerald v. Elliott*, 812.

See SALES, 7; TIME, 2.

LIFE TABLES.**See EVIDENCE, 11.****LIMITATIONS OF ACTIONS.**

1. **ACTION TO QUIET TITLE.**—The statute of limitations does not begin to run in favor of the defendant, in an action to quiet title, until he asserts title or ownership to the property in controversy. *Pleasant v. Blodgett*, 624.
2. **NOT STAYED BY CONVEYANCE TO ONE INCOMPETENT TO TAKE TITLE.**—The statute of limitations having begun to run against the owners of real property in the adverse possession of another, a conveyance and delivery of possession of such property by the adverse occupant, to one incompetent to take the title, does not arrest the running of the statute against such owners. *Myers v. McGavock*, 627.

See EASEMENTS, 3; PUBLIC LANDS, 1.**LIVESTOCK.****See CARRIERS, 1-4; DAMAGES, 5.****LOST INSTRUMENTS.****See NEGOTIABLE INSTRUMENTS, 2.****LOTTERIES.**

1. **CONTRACTS GROWING OUT OF ILLEGAL TRANSACTIONS—LOTTERY TICKET.** One who purchases a lottery ticket in violation of law may recover the proceeds of a prize drawn by it from one who has collected such proceeds after having fraudulently obtained the ticket from such purchaser in exchange for another worthless lottery ticket after the former has drawn the prize. *Martin v. Richardson*, 353.
2. **LOTTERY TICKETS—RIGHT TO RECOVER.**—The lawful owner of a legal lottery ticket which has drawn a prize may recover the amount thereof from one who has fraudulently obtained the ticket from him after the drawing, and has collected the amount of the prize. In such case every presumption is indulged in favor of the legality of the ticket and of its purchase, in the absence of allegation and proof to the contrary. *Martin v. Richardson*, 353.

LUMPING CHARGE.**See MECHANICS' LIENS, 3, 4.****LUNATICS.****See INSANE PERSONS.****MALICIOUS PROSECUTION.**

1. **THE FACT THAT THE PERSON accused makes a motion to dismiss the prosecution cannot be considered as an admission of guilt on his part, nor as showing that his accuser had probable cause to believe him guilty.** Therefore, in a trial of a civil action for malicious prosecution, the defendant will not be permitted to argue to the jury as to the effect of such motion. *Wheeler v. Hanson*, 408.
2. **EVIDENCE IN DEFENSE.**—One who charges his employee with embezzling goods from a store will not, on a trial of a civil action for malicious

prosecution, be permitted to prove that the plaintiff, being authorized to exchange such goods, exchanged them for land at a price greatly above its real value, though an agreement had been made by plaintiff for their exchange, such goods still remaining in the store at the time the prosecution was instituted. *Wheeler v. Hanson*, 408.

3. **DAMAGES ACCRUING FROM A MALICIOUS PROSECUTION AFTER THE COMMENCEMENT OF A CIVIL ACTION** are recoverable therein, because there can be but one assessment of damages for such a cause of action. *Wheeler v. Hanson*, 408.
4. **DAMAGES.**—In an action by a watchmaker against his former employer for malicious prosecution on a charge of embezzlement plaintiff should be permitted to show the nature of his business, and the tools required in it, the subsequent difficulty he had in procuring employment, the trouble to which he was subjected by taking away the property on which he relied to obtain other tools, the amount of his earnings, the injury to his feelings and reputation, and indignity he suffered, because the natural and necessary result of the charge made against plaintiff would be to render it more difficult for him to obtain employment, and to impair his credit and affect his reputation, as well as to injure his feelings and subject him to indignity. *Wheeler v. Hanson*, 408.
5. **DAMAGES, COUNSEL FEES, AND COSTS OF SURETIES.**—In an action for malicious prosecution plaintiff may be permitted to prove that he necessarily paid sureties to go upon his bond, and that he paid counsel fees. Both these expenses are direct and necessary results of the prosecution, and constitute part of the damages to which plaintiff was subjected in consequence thereof. *Wheeler v. Hanson*, 408.

MANDAMUS.

See INJUNCTIONS, 4.

MANSLAUGHTER.

See HOMICIDE, 3, 17.

MAPS.

See DEDICATION, 1, 2.

MARRIAGE AND DIVORCE.

1. **CHANCERY HAS NO JURISDICTION TO ENTERTAIN A SUIT FOR THE NULLITY OF A MARRIAGE** where no fraud, duress, or lunacy is charged, and the ground for avoiding the marriage is, that when it was contracted the woman had a former husband living, but is not shown to have led the other to contract the marriage through deception, or even through ignorance of the facts. *Kelley v. Kelley*, 389.
2. **JURISDICTION OF A COURT OF RECORD OF ANOTHER STATE OF THE SUBJECT OF DIVORCE** is a SPECIAL authority not recognized by the common law, and its power must be shown, and must appear to have been strictly pursued. *Kelley v. Kelley*, 389.
3. **DIVORCE.—ALIMONY AND COUNSEL FEES** cannot be decreed except in a case specified in the statutes. *Kelley v. Kelley*, 389.

MARRIED WOMEN.

See ACKNOWLEDGMENTS, 1; ESTOPPEL, 1; HUSBAND AND WIFE.

MASTER AND SERVANT.

1. **A MASTER IS NOT ANSWERABLE** for the negligent act of his servant or agent if the latter in performing the act from which the injury resulted was not acting in the course of his employment. *Walker v. Hannibal etc. R. R. Co.*, 547.
2. **RAILWAY CORPORATIONS.—AUTHORITY OF AN EMPLOYEE TO DO AN ACT WITHIN THE LINE OF HIS EMPLOYMENT IS NOT TO BE INFERRED** unless express authority is proved, or the officers of the corporation are shown to have known the employee to be engaged in the acts in question for such a length of time as would justify the presumption that he was authorized to do them. Mere knowledge on the part of another employee who had no authority over the employee whose act is in question is not sufficient. *Walker v. Hannibal etc. R. R. Co.*, 547.
3. **VESSELS.**—The mate of a vessel and a seaman are fellow-servants, and the latter, therefore, cannot recover of the owners for an injury received while using an implement which he was directed to use by such mate, who was guilty of negligence in constructing the implement, and in ordering the seaman to use it. *Kalleck v. Deering*, 421.
4. **COSERVANTS—NEGLIGENCE.**—To entitle a servant to recover of his master for the negligence of another servant associated with him in the same department of service he must allege and prove that such other servant was his superior in point of authority and control, and that the negligence was gross. *Greer v. Louisville etc. R. R. Co.*, 845.
5. **RISKS ASSUMED BY SERVANT—NEGLIGENCE OF FELLOW-SERVANT.**—A servant, upon entering an employment assumes the natural and ordinary risks incident to the business in which he engages, and impliedly contracts that the master shall not be liable for injuries, consequent upon the negligence of a fellow-servant in the employment of whom the master has exercised proper care. *Western Stone Co. v. Whalen*, 244.
6. **CARE REQUIRED IN SELECTION OF EMPLOYEES.**—It is the duty of the master to exercise ordinary and reasonable care in the employment and selection of careful and skillful co-employees, and such care requires a degree of diligence and caution proportionate to the exigencies of the particular service, and is such care as a reasonably prudent person would exercise, in view of the consequences that might reasonably be expected to result if an incompetent, careless, or reckless servant was employed for the particular duty. *Western Stone Co. v. Whalen*, 244.
7. **HAZARDOUS EMPLOYMENT—DUTY TO SELECT COMPETENT SERVANTS—NEGLIGENCE.**—When the service in which a servant is employed is such as to endanger the life and limbs of co-employees, the master, upon engaging such servant, is required to make reasonable investigation into his character, skill, and habits of life, and his failure to perform this duty is negligence, for which he is liable if injury is occasioned to a co-employee, either by the negligence, incapacity, or intemperance of such servant. *Western Stone Co. v. Whalen*, 244.
8. **DUTY TO EMPLOY COMPETENT SERVANTS.**—A master who employs a servant to engage in a business, known to be hazardous, and, when the proper and safe discharge of the duty requires a high degree of care, diligence, and skill, is charged with the exercise of care reasonably commensurate with the perils and hazards likely to be encountered in the performance of the duty, and the master impliedly contracts with each servant entering his employ to discharge that duty, and the servant may, without sufficient appearing to put him upon notice to the

contrary, rely upon the due and reasonable performance of such duty by the master. *Western Stone Co. v. Whalen*, 244.

9. **EVIDENCE OF INCOMPETENCY OF FELLOW-SERVANT.**—While specific acts of recklessness, carelessness, or incompetency by a fellow-servant may, under the circumstances of a particular case of injury to another servant, be competent as tending to show that the master could and ought to have known of the character and habits of his servant, yet, when the reputation of such servant is competent to be shown, it is his general reputation only. *Western Stone Co. v. Whalen*, 244.
10. **SERVANT'S NOTICE OF INCOMPETENCY OF FELLOW-SERVANT.**—If a servant knows, or by the exercise of reasonable care and diligence should know, the general reputation of his fellow-servant for skill and care, before and at the time of receiving an injury at the hands of the latter, he is charged with notice of whatever that reputation is, and, if it is bad, he must not expose himself to the consequences liable to result. *Western Stone Co. v. Whalen*, 244.
11. **PRESUMPTION AS TO COMPETENCY OF FELLOW-SERVANTS.**—A servant, upon entering an employment, has a right to assume that the master has discharged his legal duty in selecting competent and careful co-employees, and may act upon that assumption in the absence of any thing putting him upon notice to the contrary. The fact as to whether he has had such notice as to require him to quit the service or assume the extra risk is conclusively determined by the finding of the trial court. *Western Stone Co. v. Whalen*, 244.
12. **INCOMPETENT FELLOW-SERVANTS—EVIDENCE OF GENERAL REPUTATION.** When injury has occurred to a servant through the incompetency, recklessness, or unskillfulness of a fellow-servant, who is generally known and reputed to be unfit, reckless, or unskillful, evidence that he is generally so reputed, or of specific acts of negligence, is competent, as tending to show that the master, by the exercise of that ordinary and reasonable care required in his employment, could and ought to have known of his unfitness, want of skill, or reckless habits. *Western Stone Co. v. Whalen*, 244.
13. **INCOMPETENT FELLOW-SERVANT—NEGLIGENCE—EVIDENCE.**—Evidence of general reputation is admissible to prove the unfitness of a fellow-servant, and ignorance of such general reputation on the part of the master may of itself, where it is his imperative duty to know the fitness of his servant, and when injury would have led to the knowledge, be such negligence, as to charge the master with liability for injury to another servant, inflicted by such incompetent fellow-servant. *Western Stone Co. v. Whalen*, 244.
14. **INCOMPETENT FELLOW-SERVANT—NEGLIGENCE—EVIDENCE.**—A servant injured by the incompetency of a fellow-servant may prove that the latter's incompetency was actually known to the master, or to his responsible representative, to whom the power of discharging has been delegated, or that either of them had received information of the fact sufficient to put a reasonably careful man upon inquiry, or that the servant had a general reputation for incompetency to such extent that, if the master had maintained a habit of vigilant supervision and inquiry, he would probably have learned the fact. *Western Stone Co. v. Whalen*, 244.
15. **INCOMPETENT FELLOW-SERVANT—NEGLIGENCE—EVIDENCE.**—Negligence on the part of a master is not to be presumed from the negligence of a

servant; but, in order to render him liable for injuries sustained by one servant from the negligence of another, some sort of negligence on the part of the master, either in the employment or retention of the servant, must be shown, and the servant's general reputation for unfitness may be sufficient to overcome the presumption that the master used due care in his selection, even though actual knowledge of such reputation or unfitness on the master's part is not shown. *Western Stone Co. v. Whalen*, 244.

16. **INCOMPETENT SERVANT—CONCLUSIVENESS OF FINDING OF NEGLIGENCE.**—The fact as to whether a master is guilty of negligence in the employment and retention of an incompetent servant, whereby a fellow-servant is injured, is conclusively determined by the finding of the trial court in favor of the latter. *Western Stone Co. v. Whalen*, 244.
17. **A MASTER BOUND TO DO CERTAIN THINGS AND WHO DEPUTES THE DOING OF THEM TO A SERVANT OR AGENT** remains answerable for the manner in which they are done, or omitted to be done. *Pullman Palace Car Co. v. Gavin*, 902.
18. **A MASTER IS ANSWERABLE TO AN INFERIOR SERVANT** for injuries resulting from the negligence of a superior servant, if such negligence was in regard to some duty to the inferior imposed by law upon the master, and by him intrusted to the negligent superior servant. *Railroad v. Spence*, 907.
19. **CONCURRENT NEGLIGENCE OF THE MASTER AND OF A FELLOW-SERVANT.** If the negligence of a master combines with that of a fellow-servant, and the two contribute to the injury of another servant, he may recover damages of the master. *Railroad v. Spence*, 907.
20. **DEFECTIVE APPLIANCES—FAILURE OF MASTER TO KEEP PROMISE TO REPAIR.**—When a master or superior servant notified by an inferior servant of a defect in the machinery, appliances, or premises furnished for his use, promises to repair within a reasonable time, such servant, by remaining in the service a reasonable time thereafter, does not assume the risk, nor waive his right to recover from the master, if injured by reason of the defect within such time. *Breckenridge Co. v. Hicks*, 361.
21. **DEFECTIVE APPLIANCES—RISK ASSUMED BY SERVANT.**—If a servant knowing of a defect in machinery, materials, or premises furnished for his use, without complaint or promise from the master or superior servant to repair, continues to use them, he assumes the risk and waives all claim against the master for injury therefrom. *Breckenridge Co. v. Hicks*, 361.

See **LIENS**, 2; **RAILROADS**, 8, 13, 14, 20-23, 26, 27; **RECEIVERS**

MAXIMS.

The maxim that "he who comes into equity must come with clean hands," applies solely to willful misconduct in regard to the matter in litigation, and not to some other illegal transaction, although it may be indirectly connected with the subject matter of the suit. *Yale etc. Stone Co. v. Wilson*, 159.

MAYOR.

See **MUNICIPAL CORPORATIONS**, 2.

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MECHANICS' LIENS.

1. **FIXTURES.**—No mechanic's lien can attach to a building for fixtures placed therein at the request of a tenant in possession. Mechanics' liens can attach only for material or work which has permanent part of the building or structure. *Patterson v. 794.*
2. **MINES.**—Under a statute giving a mechanic's lien to every person who shall do work or furnish materials for the working or development of any mine, or in searching for metals, the lien is given to every person who shall do work or furnish materials, either in mining or preparation of minerals, and applies as well to claims in which minerals have not, as well as to claims in which minerals have, been found. *Williams v. Toledo Coal Co., 799.*
3. **LUMPING CHARGE.**—A claim for mechanic's lien for building a wagon-road cannot be joined in a lumping charge with one for digging or running a tunnel. *Williams v. Toledo Coal Co., 799.*
4. **LUMPING CHARGE.**—A claim for a mechanic's lien containing a lumping charge in which are mingled items for which a lien is given and items for which no lien is given is insufficient to support the claim. A defect cannot be cured by oral evidence by means of which the items subject to such lien may be separated from those not subject to such lien. *Williams v. Toledo Coal Co., 799.*
5. **MINES—WAGON-ROAD.**—Under a statute giving a lien to all persons who shall do work or furnish materials upon any shaft, tunnel, adit, drift, or other excavation, one who performs labor in building a wagon-road connecting with a mine, but not constituting an excavation, is not entitled to such lien. *Williams v. Toledo Coal Co., 799.*
6. **CONTRACT STIPULATIONS AGAINST.**—A subcontractor or materialman has no right of mechanic's lien when the principal contractor has stipulated with the owner in writing that no liens shall be filed against the property. *Waters v. Wolf, 815.*
7. **CONTRACTS AGAINST—CONSTITUTIONAL LAW.**—A contract between a principal contractor and the owner that no mechanics' liens shall be filed against the property destroys the right of a sub-contractor or materialman to file a lien, and in such case the right cannot be created by statute. The subcontractor or materialman can have no lien against the owner not founded on the contract of the principal contractor, and such right cannot be created by statute, independent of the contract. *Waters v. Wolf, 815.*
8. **CONTRACT AGAINST—CONSTITUTIONAL LAW.**—A statute declaring a contract between a principal contractor and the owner in ordering work to be done, and requiring the written consent of the materialman or subcontractor to bind him by a stipulation in the contract between the principal contractor and the owner that no mechanics' liens shall be filed, is unconstitutional, as an attempt to create a debt and a lien therefor against the express covenant in the contract, and as an attempt to frame a new contract, and substitute it for the one made by the parties. *Waters v. Wolf, 815.*

MENTAL ANGUISH.

See DAMAGES, 2.

MERGER.

See ACTIONS, 3; LIENS, 1.

MINES.

See MECHANICS' LIENS, 2, 3.

MINORS.

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MISREPRESENTATIONS.

See CONTRACTS, 1; VENDOR AND PURCHASER, 4-6.

MISTAKE.

See JUDGMENTS, 6; NAMES, 2; TRIAL, 7.

MONOPOLY.

See CARRIERS, 6.

MORTGAGES.

1. **DEED ABSOLUTE MAY BE SHOWN TO BE—EVIDENCE NECESSARY.**—When land is conveyed in fee by a deed with covenants of warranty, and there is no condition or defeasance either in the deed or in a collateral paper, and parol evidence is resorted to for the purpose of establishing that the deed was given as a mortgage, such evidence must be clear and convincing; otherwise the presumption that the deed is what it purports upon its face to be must prevail. *Kekley v. Wood*, 265.
2. **DEED, WHEN IS.**—When a conveyance is by deed, with a defeasance in a collateral paper, or a contract for a resale, and the evidence leaves it in doubt whether the transaction is intended as a conditional sale or a mortgage, it is, as a general rule, treated as a mortgage. *Kekley v. Wood*, 265.
3. **DEED, WHEN IS.**—If an indebtedness or liability exists between the parties, either arising from a debt existing prior to a conveyance by deed absolute, or a debt arising from a loan made at the time of the conveyance, or from any other cause, and this debt is not discharged or satisfied by the conveyance, and the grantor is regarded as still owing, and bound to pay it at some future day, so that the payment stipulated for in an agreement to reconvey is in reality the payment of such subsisting debt, the whole transaction amounts to a mortgage, whatever language the parties may have used, and whatever stipulations they may have inserted in the instruments. On the contrary, if no such relation whatsoever of debtor and creditor is left subsisting,

- then the transaction is not a mortgage, but a mere sale and contract of repurchase. *Keithley v. Wood*, 265
6. **DREDS MAY BE SHOWN TO BE.**—Whether a deed and an agreement to resell are to be regarded as an absolute sale, or as a mortgage, depends upon the existing facts and circumstances which led to their execution, and not upon the form the parties gave the transaction, and such facts and circumstances may be proved by parol evidence, not for the purpose of contradicting the deed, but to raise an equity paramount to its terms and conditions. *Keithley v. Wood*, 265.
 7. **DEED AND AGREEMENT TO RECONVEY.**—In case of a warranty deed and agreement to reconvey, the character of the deed must be determined by the intention of the parties, clearly and satisfactorily proved, and any doubt as to the intention is resolved in favor of the construction that the conveyance is a security for a debt. *Keithley v. Wood*, 265.
 8. **MORTGAGE BY CORPORATION TO SECURE ADVANCES.**—A corporation in active business may provide, by mortgage of its property, for advances, both present and future. Such a provision, without any stipulation that the mortgagor may continue in business for his own benefit, or that the mortgagee shall make any additional advances, does not necessarily render the mortgage fraudulent, although it may subsequently transpire that the mortgagor was, in fact, unable to pay all his debts at the time the mortgage was given. *Sabin v. Columbia Fuel Co.*, 756.
 9. **RIGHT TO MAKE AS AGAINST CREDITORS.**—Every mortgage necessarily tends to hinder and delay creditors other than the mortgagee, but if fairly and honestly made is neither an unjust or unlawful interference with the rights of others, within the terms of a statute making conveyances void if intended to hinder or delay creditors. *Sabin v. Columbia Fuel Co.*, 756.
 10. **MORTGAGES AS FRAUDULENT CONVEYANCES—PARTICIPATION BY MORTGAGEE.**—Although a mortgage is executed by the mortgagor with intent to delay his creditors it is not fraudulent as to the mortgagee, unless he participated in the fraudulent intent. *Sabin v. Columbia Fuel Co.*, 756.
 11. **FRAUD—BURDEN OF PROOF.**—Although circumstances surrounding the execution of a mortgage point with some directness to the conclusion that it was intended to hinder and delay creditors, yet, if such circumstances are all explained consistently with honesty and good faith, the mortgage is *prima facie* valid, and the burden of proof to show fraud by a clear preponderance of the evidence is upon the attacking party. *Sabin v. Columbia Fuel Co.*, 756.
 12. **MORTGAGED PREMISES—JUDICIAL SALE OF—WHO MAY MAKE.**—The trial court has the power, in a foreclosure suit, to appoint some proper disinterested person, other than the sheriff of the county, as master commissioner, to make the sale of the mortgaged premises. The plaintiff cannot dictate the person. *American Investment Co. v. Nye*, 692.
 13. **POWER OF SALE—INJUNCTION—TENDER.**—A court of equity may enjoin the execution of a power of sale contained in a mortgage when the mortgagee is proceeding in an improper or oppressive manner, or is perverting the power from its legitimate purpose, as when, having refused repeated tenders, he files a bill to foreclose, dismisses it without prejudice when the case is ready for hearing, and advertises the land for sale under a power in the mortgage, with the avowed purpose of

compelling the payment of another claim which is disputed. *McCalley v. Otey*, 87.

12. **TENDER—PAYMENT OF MORTGAGE DEBT INTO COURT IS NOT NECESSARY** in order to maintain a bill in equity filed by the mortgagor to redeem and to enjoin the execution of a power of sale contained in the mortgage, when tender has been made and refused, and at all times been kept good after it has made. *McCalley v. Otey*, 87.

See **ACKNOWLEDGMENTS**, 13, 15; **CORPORATIONS**, 17; **EQUITY**, 5; **FRAUDULENT CONVEYANCES**, 3; **HOMESTEADS**, 5, 6; **INFANTS**, 8; **NOTICE**, 1; **PARTY WALLS**, 1; **SUBROGATION**, 1; **TRUSTS**, 4, 5; **VENDOR AND PURCHASERS**, 2.

MOTIVE.

See **HOMICIDE**, 4.

MULTIPLICITY.

See **ACTIONS**, 2.

MUNICIPAL CORPORATIONS.

1. **MUNICIPAL AUTHORITY—DELEGATION OF.**—If a municipality is given the right to exercise a certain authority in such manner and by such officers and agents as it shall from time to time choose, appoint, or direct, it can delegate the exercise of its powers to a board of officers. *Lynch v. Forbes*, 402.
2. **MUNICIPAL ORDINANCES—APPROVAL—VALIDITY.**—Under a charter providing that all municipal ordinances shall be submitted to the mayor for his approval or veto before they shall become law, and that, in the absence or inability of the mayor, the president of the city council shall have the power to approve and sign ordinances passed during the mayor's absence, an ordinance approved and signed by such president during the time that the office of mayor is vacant, and without an incumbent, is null and void. *Babbridge v. Astoria*, 796.
3. **MUNICIPAL ORDINANCES—APPROVAL.**—If the submission of municipal ordinances to the mayor of a city is made necessary by the express terms of the charter, before such ordinance can become law, the requirement of the charter is mandatory, and noncompliance is fatal to the ordinance. *Babbridge v. Astoria*, 796.
4. **NOTICE AS TO POWER OF.**—One who contracts with a municipal corporation must, at his peril, take notice of the powers conferred by its charter, and whether the proposed indebtedness is in excess of the limitation imposed thereby. *Gutta Percha etc. Mfg. Co. v. Ogalalla*, 696.
5. **CONTRACTS—RATIFICATION OF.**—If the contract of a municipal corporation is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed *ultra vires*, and can be ratified only upon the conditions essential to a valid agreement in the first instance; but, if the formalities prescribed or conditions imposed are not intended as a restriction upon the corporate power, a binding ratification may be made in a different mode. *Gutta Percha etc. Mfg. Co. v. Ogalalla*, 696.
6. **VOID TAX SALE, RECOVERY OF MONEY.**—In the absence of an express statutory provision authorizing it no municipality can be compelled, either at law or in equity, to refund money received by it from the

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sale of real estate for taxes, even in cases where the property which such taxes were levied was not liable therefor. The caveat emptor applies with full force to the purchaser at such sale. *Pennock v. Douglas County*, 579.

7. **STREETS, CHANGING GRADE OF.**—The damages sustained by a party from a change of grade is caused by its actual grading, and not by an ordinance fixing the grade. *Eachus v. Los Angeles etc. Ry. Co.*
See **WATERS**, 2.

MURDER.

See **HOMICIDE**.

MUTUAL BENEFIT ASSOCIATION.

See **INSURANCE**, 11-17.

NAMES.

1. **PARTIAL PLEADING.**—A person's legal name is made up of his first name and his surname, and to be ignorant of either is to be ignorant of the whole. Such person's name within the meaning of a statute authorizing a complaint against a party by another than his true name, if the plaintiff is ignorant of the defendant's correct name. *Enclosed v. Olsen*, 100.
2. **MISTAKE IN MIDDLE INITIAL.**—If a complaint charges Charles P. with the commission of a crime, and the subsequent proceedings be against Charles P., evidence is properly received to show that there was but one complaint, and that the subsequent use of Charles P. was but a mere clerical error. The admission of such evidence does not violate the rule that a record cannot be impeached by contradictory evidence. *Wheeler v. Hanson*, 408.

See **JUDGMENTS**, 6; **PROCESS**, 4.

NAVIGATION.

See **WHARVES**.

NECESSARIES.

See **INFANTS**, 6-8.

NEGLIGENCE.

1. **PROXIMATE CAUSE.**—A hole under the end of a bridge does not make the county liable for injury received by the driver of a buggy, horse, becoming frightened after stepping with his forefeet on the bridge, backs and turns the buggy over, thus throwing it violently down an embankment, in the absence of any evidence to the contrary. The opinion of the party injured, that the fright of the horse was caused by the hole under the bridge. *Mason v. County of Spotsylvania*, 887.
2. **EVIDENCE.**—When issue is made as to the safety of any machine or work of man's construction which is of practical use the machine which it has served that purpose, when put to that use, is material to the issue, and ordinary experience of that practical use and the effect thereof bear directly upon such issue. Evidence is always competent. *Bloomington v. Legg*, 216.

3. **EVIDENCE OF OTHER ACCIDENTS.**—In an action to recover for injury caused by negligence, evidence that other accidents have occurred of a similar character to that which resulted in the injury in question is competent, not for the purpose of showing independent acts of negligence, but as tending to prove that the common cause of the accidents is a dangerous, unsafe thing. *Bloomington v. Legg*, 216.
 4. **EVIDENCE OF OTHER ACCIDENTS.**—In an action to recover for injury resulting from negligence evidence of similar accidents resulting from the same cause, is competent to show a dangerous condition, and as tending to show notice. The frequency of such accidents creates a presumption of knowledge, and is material to the question of diligence used to obviate the cause of injury. *Bloomington v. Legg*, 216.
 5. **EVIDENCE OF OTHER ACCIDENTS.**—To render evidence of similar accidents, resulting from the same cause, competent in an action to recover for injury resulting from negligence, it must appear, or the evidence must reasonably tend to show, that the instrument or agency which caused the injury was in substantially the same condition at the time such other accidents occurred as at the time the accident complained of was caused. *Bloomington v. Legg*, 216.
 6. **EVIDENCE OF PRECAUTION TAKEN AFTER AN ACCIDENT** is not admissible to show negligence. *Bloomington v. Legg*, 216.
- See CARRIERS, 3; DAMAGES, 2; INSANE PERSONS, 2, 3; MASTER AND SERVANT, 1, 3-5, 7, 16, 17; PARTY WALLS, 2; RAILROADS, 8, 9, 11-14, 17-19, RECEIVERS; SHIPPING, 2.

NEGOTIABLE INSTRUMENTS.

1. **WHAT ARE NOT.**—A promissory note providing that in case suit is brought thereon the makers will pay such additional sum as the court may adjudge reasonable as attorney's fees is not negotiable. *Kendall v. Parker*, 117.
2. **A PROMISSORY NOTE** is a written engagement to pay absolutely and unconditionally a certain sum of money. If the instrument provides that in case of a suit thereon that the plaintiff may recover such additional sum as the court may deem reasonable for attorney's fees it cannot be a promissory note. *Kendall v. Parker*, 117.
3. **THE NEGOTIABILITY OF A CERTIFICATE OF DEPOSIT** in the usual form, issued by a bank and made payable to order or bearer, is not destroyed either by a stipulation for the return of the certificate, or by a provision for payment "in current funds," or by a provision that the amount thereof shall bear interest if left six months, but no interest after six months. *Kirkwood v. First Nat. Bank*, 683.
4. **CERTIFICATE OF DEPOSIT.—BONA FIDE PURCHASER.**—A certificate of deposit in the usual form, issued by a bank and made payable to order or bearer, is negotiable, and a *bona fide* purchaser thereof for value before maturity, without notice of equities, is protected to the same extent as an innocent holder of other negotiable paper. *Kirkwood v. First Nat. Bank*, 683.
5. **NEGOTIABLE INSTRUMENT TAKEN IN RENEWAL OF A PRE-EXISTING NOTE** which is surrendered, and the sureties thereon released, makes its payee a *bona fide* holder for value and entitled to protection as such against any defenses of which he had no notice when he received it. *Lookout Bank v. Aull*, 934.

defendant, is a direct violation of the provision of the constitution guaranteeing a public trial to a person accused of crime, and entitles him, if convicted, to a new trial. *People v. Hartman*, 102.

6. **EVIDENCE, NOT JUSTIFYING.**—Newly discovered testimony to discredit a witness, or which is merely cumulative, is not sufficient to warrant the granting of a new trial. *State v. Stickney*, 284.
7. **NEWLY DISCOVERED EVIDENCE.**—Evidence within the knowledge of a party at the time of trial, though he was absent from the trial, and failed to communicate it to his attorney, is not newly discovered, and is not ground for granting a new trial. *Thicker v. Miller*, 302.
8. **REVEROT OF ORDER FOR.**—If there is a ruling at a trial that plaintiff cannot recover as to the first and third counts of his complaint, and a verdict in his favor on the second count, and a bill of exceptions filed by the defendant is sustained in the appellate court, and a new trial granted, the defendant is not entitled to an order in the trial court affirming the judgment as to the first and third counts. There is no judgment. The order for the new trial leaves all matters open, and the plaintiff may move for, and be permitted to make, amendments to his pleadings. *Hob v. Stewart*, 442.

See **APPEAL**, 4; **JUDGMENTS**, 8; **TRIAL**, 7.

NONFEASANCE.

See **OFFICERS**.

NONSUIT.

See **STIPULATIONS**.

NOTICE.

1. **ONE WHO TAKES A MORTGAGE UPON REAL PROPERTY HAS CONSTRUCTIVE NOTICE** of every fact which could have been ascertained by an inspection of the deeds and mortgages on record in the chain of title. Though one of these mortgages is apparently satisfied of record, yet an intending mortgagee must take notice of all the facts appearing therefrom, and from the entry of satisfaction thereof. *Kirsch v. Tosier*, 722.
2. **A PURCHASER OF PROPERTY IS BOUND** to act as an ordinarily careful man would under the circumstances, and, if he acts in contravention to the dictates of reasonable prudence, and refuses to inquire when the propriety of inquiry is naturally suggested by the circumstances known to him, he is chargeable with notice of the facts which such an inquiry would have disclosed. *Kirsch v. Tosier*, 722.

See **BANKS**, 4; **FRAUDULENT CONVEYANCES**, 4; **GUARANTY**, 6-8; **GUARDIAN AND WARD**, 9, 16; **LANDLORD AND TENANT**, 2; **MASTER AND SERVANT**, 10; **TRIAL**, 2; **TRUSTS**, 2; **VENDOR AND PURCHASER**, 1, 2.

NURSERYMEN.

See **SALES**, 6.

OBSTRUCTIONS.

See **WATERS**, 1.

ANY PUBLIC OFFICER GUILTY OF MISFEASANCE OR NONFEASANCE IN OFFICE whereby an individual sustains injury is answerable therefor in an action for damages. *Beardlee v. Dolge*, 707.

See MUNICIPAL CORPORATIONS, 1; PROCESS, 1-3.

OPINIONS.

See WITNESSES, 3, 4.

ORDINANCES.

See MUNICIPAL CORPORATIONS, 2, 3.

OUSTER.

See GUARDIAN AND WARD, 3.

PARTIES.

See HOMETEAD, 4; PARTNERSHIP, 5; TRUSTS, 2.

PARTITION.

See INSURANCE, 5.

PARTNERSHIP.

1. **APPLICATION OF PARTNERSHIP ASSETS TO FIRM DEBTS.**—The right in equity of firm creditors to payment out of the partnership effects, to the exclusion of the separate creditors of deceased or insolvent partners, results solely from the right of the partners, or their representatives, to have the joint estate thus applied. The rule is for the benefit and protection of the partners themselves. The equity of the creditor is of a dependent and subordinate character. *Farnell v. Hutton*, 237.
2. **IMPROVEMENTS BY SURVIVING PARTNER.**—When a surviving partner erects improvements on the partnership realty the respective interests of himself and the heirs of the deceased partner in the property may be determined in a suit to settle the partnership accounts without partition of the property; but the surviving partner cannot charge such heirs with their share of expenses incurred in erecting such improvements, in the absence of an express agreement on their part, or such course of dealing as shows an implied agreement to that effect. *Parker v. Parker*, 48.
3. **DISSOLUTION BY DEATH—DISPOSITION OF PROPERTY.**—On the death of a partner the firm of which he was a member is *eo instanti* dissolved, and one of the consequences of such dissolution is that his distributees, as to the personal assets, become joint owners, and his heirs, as to the realty, become cotenants with the surviving partner. *Parker v. Parker*, 48.
4. **DISSOLUTION BY DEATH—DISPOSITION OF PROPERTY.**—At the dissolution of a partnership by the death of one of the partners the title of the personal assets devolves on the survivor to be used to pay the debts of the partnership, the residue to be distributed among the representatives of the deceased; but the title to the partnership realty devolves on the heirs of the deceased partner, subject in equity to be converted into partnership assets and used for partnership purposes. *Parker v. Parker*, 48.

- 8. DISSOLUTION BY DEATH—PARTIES TO SETTLEMENT.**—In a suit touching the final settlement under administration of the interest of a deceased partner in the lands or assets of the partnership, his heirs are necessary parties, and their nonjoinder may be taken advantage of by objection or in the absence of objection by the court *ex mero motu*. *Parker v. Parker*, 48.

PARTY WALLS.

- 1. USE OF, WHAT IS, AND WHO ANSWERABLE FOR.**—If a contract provides that if any portion of a party wall shall be extended and rebuilt, and shall be used by either of the contracting parties, or his assigns or heirs, he or they shall pay the party who constructed the same, or his heirs or assigns, one-half the actual cost of the portion so used by him, the use of the wall means making use of it in the progress of constructing the house on the adjoining land, and the builder of such house is the person who uses the wall and becomes liable for one-half of the cost thereof, and one who purchases from him after his house is constructed, and thereafter maintains such house, does not thereby become chargeable under the contract for using the wall. A mortgagee cannot be held liable under the contract, though his mortgage was executed before the use of the wall was made, and he afterwards foreclosed the mortgage and thereby became the owner of the property. *Pfeifer v. Matthews*, 435.
- 2. PARTY WALLS—DAMAGES FOR FALL OF.**—One who increases the height of a party wall, which had been constructed under an agreement giving him a right so to do, is not liable for its falling upon and injuring the adjacent premises, if he was not negligent, though he built such wall without the consent or knowledge of the owner of the adjacent premises. The owner having a right to add to such a wall is not an insurer of the safety of the operation, nor answerable for resulting damages, unless guilty of negligence. *Negus v. Becker*, 724.

PAYMENT.

- BURDEN OF PROOF.**—In an action to recover mortgaged personalty, where issue is joined on the question as to whether the debt secured by the mortgage has been paid, the burden of proof is upon the defendant. *First Nat. Bank v. Helger*, 316.

PENALTY.

See STATUTES, 2.

PENSIONS.

- 1. EXEMPTION OF FROM ATTACHMENT AND EXECUTION.**—STATUTES which protect pension money from attachment and execution are remedial in their nature, and should be liberally construed in favor of the pensioner. *Price v. Society for Savings*, 198.
- 2. ATTACHMENT AND EXECUTION—STATUTES—SAVINGS BANK DEPOSIT.**—Under that clause of section 1164, General Statutes of Connecticut, exempting "any pension moneys received from the United States while in the hands of the pensioner," a savings bank deposit, consisting exclusively of the proceeds of a pension check received from the United States, is exempt from attachment and execution. *Price v. Society for Savings*, 198.

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PERSONAL EXAMINATION.

See TRIAL, 4.

PLATFORMS.

See RAILROADS, 9-11.

PLATS.

See DEDICATION, 1, 2.

PLEDGE.

1. **WAREHOUSE RECEIPTS.—UNAUTHORIZED PLEDGE** by a factor or agent to sell, of a warehouse receipt for the property of his principal, is not factually to divest the title of the latter, who may recover the property from the pledgee. *Commercial Bank v. Hurt*, 38.
2. **WAREHOUSE RECEIPTS.—UNAUTHORIZED PLEDGE.—LIMITATION IN CONTRACT OF PLEDGE.**—When a factor or agent to sell pledges the property of his principal or the warehouse receipts therefor without authority, and a clause in the contract of pledge that the property "has been advanced upon by us to its full value" limits the operation of the pledge to the factor's actual interest in the property, but does not divest title of the real owner as against the pledgee. *Commercial Bank v. Hurt*, 38.

See CHATTEL MORTGAGES, 1; FACTORS.

PLEADING.

1. **A count for money had and received with a bill of particulars of two hundred dollars for cash paid by mistake and under misapprehension of the facts at the time of a conveyance to plaintiff by S. Saunders is, in the absence of a motion for further particulars, insufficient.** *Holt v. Stewart*, 442.
2. **THE STATUTE OF FRAUDS MUST BE SPECIALLY PLEADED**, and cannot be relied upon under the general issue. *Citty v. Manufacturing Co.*, See EQUITY, 6; JUDGMENTS, 18; NEW TRIAL, 8; REPLEVIN, 1; REWARD.

POLITICAL RIGHTS.

See EQUITY, 1-4.

POLLUTION.

See WATERS, 2.

POSSESSION.

See ADVERSE POSSESSION; LIENS, 1, 2; TRESPASS.

POWERS.

See MORTGAGES, 11; SUBROGATION.

PRACTICE.

See APPEAL; TRIAL.

PREFERENCES.

See CORPORATIONS, 16, 18, 19; FRAUDULENT CONVEYANCES, 1.

PRESCRIPTION.

See DEDICATION, 4; EASEMENTS.

PRESUMPTION.

See EVIDENCE, 9, 10; JUDGMENTS, 5; MASTER AND SERVANT, 1; MORTGAGES, 1; REPLEVIN, 2.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIORITY.

See TIME.

PRIVILEGED COMMUNICATIONS.

See WITNESSES, 2.

PROCESS.

1. **PROCESS, RIGHT TO ENTER THE PREMISES OF A STRANGER TO SERVE.**—A constable is not justified in entering a building for the purpose of serving civil process on a person whom he believes to be therein, if such person is not there, and the owner of the building has done nothing to induce the officer to believe that the person he sought is to be found there. *Blatt v. McBarron*, 385.
2. **OWNER OF BUILDING IS NOT LIABLE FOR INJURIES RECEIVED BY A TRESPASSER THEREIN.**—Hence if an officer charged with the service of civil process enters a building in which he believes the defendant to reside, for the purpose of serving such process, but the defendant does not reside there, and the officer is injured while in such building from its dangerous condition, he cannot recover of the owner for the damages suffered, because such officer is a mere trespasser, to whom the owner owes no duty. *Blatt v. McBarron*, 385.
3. **CRIMINAL AND CIVIL PROCESS, DIFFERENCE BETWEEN THE RIGHT OF AN OFFICER TO ENTER A BUILDING UNDER.**—An officer charged with the service of criminal process has the right to enter the building of a stranger if such officer believes in good faith that the person whom it is his duty to arrest is to be found therein, though such belief is erroneous; but under civil process the right of the officer to enter the building is dependent on the person whom he seeks being therein, and being a trespasser in entering, the officer assumes all risks arising from the condition of the building and its want of proper repair. *Blatt v. McBarron*, 385.
4. **NAMES—JURISDICTION.**—A defendant must be sued by his true name if it is known or can be ascertained by the plaintiff. Hence, except in those special cases in which the statute allows the full Christian name to be dispensed with, a court obtains no jurisdiction over the person of a defendant served with summons by leaving a copy thereof at his usual place of residence, in compliance with the statute, unless such defendant is designated by his true name. *Berwald v. Olsen*, 557.
 See COURTS; INFANTS, 11; JUDGMENTS, 2-4; JURISDICTION, 3.

PROFITS.

See JOINT STOCK COMPANIES, 2.

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PROMISE OF MARRIAGE.

See SEDUCTION, 2-4, 7.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS, 1, 2, 7.

PROMOTERS.

See CORPORATIONS, 5-7; JOINT STOCK COMPANIES.

PUBLIC LANDS.

1. **SALE BY PRIVATE PARTY—BREACH OF WARRANTY—LIMITATION.**—A private person conveys land owned by the United States, and warrants the title, the covenant of warranty is broken when made, and the right of action accrues thereon immediately, and the statute of limitation immediately begins to run against such cause of action. *Jones*, 486.
2. **CONVEYANCE BY PRIVATE PARTY—BREACH OF WARRANTY—RIGHT OF ACTION.**—A grantee by warranty deed executed by a private person of lands owned by the United States cannot take possession without becoming a wrongdoer, and is not required to take or attempt possession, and his right of action accrues immediately to recover for breach of the warranty, not dependent on eviction or any future act. *Pevey v. Jones*, 486.
3. **TIDE LANDS—RIGHTS OF STATE.**—Upon the admission of a state into the union it acquires an absolute property in, and dominion over, lands under tide water, with the right to dispose of the title to them free from any easement of the upland owners therein, and subject only to the paramount right of navigation and commerce. *Lewis v. Peavy*, 772.

PUBLIC POLICY.

See JOINT STOCK COMPANIES, 1.

PUBLIC USE.

See EMINENT DOMAIN; RAILROADS, 1.

PUNISHMENT.

See STATUTES, 7.

QUASHING.

See TRIAL, 8, 9.

QUITCLAIM DEEDS.

See DEEDS, 3, 4.

QUO WARRANTO.

See CORPORATIONS, 4.

RAILROADS.

1. **PUBLIC USE.**—Railroads, like all other public thoroughfares, are public instrumentalities; and the power to construct and maintain them is granted to corporations for a public purpose. *State v. Dodge City Ry. Co.*, 295.

2. **RIGHT TO REMOVE.**—When once constructed under a lawful charter a railroad, including the roadbed, superstructure, and other permanent property of the corporation, is charged not only in the hands of the original corporation, but of purchasers as well, with the burden of the company's charter obligations, and cannot be removed or relieved of such burden without the consent of the state. *State v. Dodge City etc. Ry. Co.*, 295.
 3. **STREETS.—DAMAGES SUFFERED BY A LOTOWNER** in grading a street to the official grade by a railway corporation cannot be mitigated by proving that he will receive benefit from the construction and operation of its road. *Eckus v. Los Angeles etc. Ry. Co.*, 149.
 4. **MAY ACQUIRE TITLE TO REAL ESTATE BY ADVERSE POSSESSION.**—Though a railroad corporation chartered by act of Congress is incompetent to take title to real estate in Nebraska until it shall have become a body corporate under the laws of that state, yet it may acquire such a title to real property in that state, by open, notorious, exclusive, and adverse possession thereof, under a claim of title for ten years, as will be valid against all persons except the state. *Myers v. McGavock*, 627.
 5. **POWER OF, TO ACQUIRE TITLE TO REAL ESTATE.**—Under the constitution of Nebraska, a railway corporation chartered by an act of Congress is incompetent to take title to real estate until it shall have become a body corporate under the laws of that state; but a conveyance of real estate to such a corporation is not therefore void; it is only voidable, and the title is valid against every one but the state, and can be divested only in proceedings brought by the state for that purpose. *Myers v. McGavock*, 627.
- STATUTES—EMINENT DOMAIN—SETTLEMENT WITH GUARDIAN.**—The provisions of chapter 16 of the Compiled Statutes of Nebraska of 1893, concerning the power of railroad companies to take land under the right of eminent domain, and to make a settlement with, and to take a release and discharge from, legal guardians, apply to all corporations operating roads in the state, whether domestic or foreign. *Myers v. McGavock*, 627.
7. **FOREIGN CORPORATION—EMINENT DOMAIN—SETTLEMENT WITH GUARDIAN.**—Unless prohibited by statute, a foreign railroad corporation may, like a domestic corporation, make a settlement with the guardian of minors, whose estate it takes under the right of eminent domain, for depot purposes, and such settlement, and a release and discharge by the guardian in pursuance thereof, will vest in the corporation a perpetual easement in the property. *Myers v. McGavock*, 627.
 8. **EVIDENCE—MASTER AND SERVANT—INSULTING REPLY OF SERVANT.**—If a passenger is injured by the negligence of a guard in closing a gate of a platform of a railroad car, and to his exclamation of pain the guard makes an offensive and insulting reply, such reply is not admissible in evidence, in an action against the corporation whose servant he was, to recover compensation for the injuries resulting from such negligence. *Butler v. Manhattan Ry. Co.*, 738.
 9. **EVERY CARRIER OF PASSENGERS OWES THEM THE DUTY TO KEEP ITS STATION** platforms in a reasonably safe condition, and is liable to persons, who are themselves duly careful, for damages sustained by reason of its negligence in not observing these duties. *Fullerton v. Fordyce*, 516.

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10. **CARRIERS OF PASSENGERS.—A PASSENGER LEAVING A TRAIN.**—RIGHT TO ASSUME that he can safely pass across a depot platform to his conveyance to his destination, and is not guilty of contributory negligence in assuming that such platform is reasonably safe and suitable for his use. *Fullerton v. Fordyce*, 516.
11. **A CARRIER OF PASSENGERS IS GUILTY OF GROSS NEGLIGENCE** in leaving a hole, eight inches wide and six feet long, to remain in the passenger depot platform four days after knowledge thereof, the question of negligence, therefore, in such a case need not be submitted to the jury. *Fullerton v. Fordyce*, 516.
12. **DUTY OF PERSONS NOT PAYING FARE.**—One riding on a railroad merely by permission of its conductor, and without payment of fare, is not entitled to the degree of care for his personal safety which is due to an ordinary passenger, and in case of injury slight negligence is sufficient to warrant a recovery against the company. *Kansas R. R. Co. v. Berry*, 278.
13. **THE ACT OF A STATION AGENT** in shipping articles overboard gratuitously, and not as freight, is not within the scope of his duty, and cannot subject the corporation to liability for the act of another of its employees respecting such articles also within the line of his employment, and not for or on account of the negligence of the station agent. *Walker v. Hannibal etc. R. R. Co.*, 547.
14. **RAILWAY CORPORATION IS NOT ANSWERABLE FOR THE NEGLIGENCE** of one of its employees in throwing certain articles from a baggage car while the train was in motion, and thus inflicting injury on a person standing near the track, if in so doing the employee was not acting in the course of his employment, but was performing a duty voluntarily assumed for a person other than his employer, and from the performance of which the master derived no benefit. *Walker v. Hannibal etc. R. R. Co.*, 547.
15. **DAMAGES TO NON-INSURABLE PROPERTY BY FIRE FROM LOCOMOTIVES.**—If a statute makes railway corporations answerable for all damages caused by fire communicated from their engines to the property of others, and gives such corporations an insurable interest in such property for whose destruction it may be answerable, it cannot be held liable for any claim of property on the ground that it was not in the character that the corporation could not have effected insurance. *Campbell v. Missouri Pac. Ry. Co.*, 530.
16. **EVIDENCE OF FIRES OTHER THAN THE ONE CHARGED.**—In an action to recover compensation for injuries alleged to have been suffered by the escape of fire from a locomotive, and its communication to the property of the plaintiff, when the question is whether the fire causing the damage in fact originated from one of the defendant's engines, it is proper to receive evidence tending to prove that other fires, both before and after the one in question, had been started at different points along the line of defendant's road by sparks from some of its engines. Such evidence is admissible, because it tends to prove the possibility, and consequent probability, that the fire was communicated to the plaintiff's property from one of defendant's locomotives. *Campbell v. Missouri Pac. Ry. Co.*, 530.
17. **PLEADING—VARIANCE.**—A person whose property was destroyed by fire communicated from a locomotive, and who alleged negligence on the part of the owner of the locomotive, may recover without proof of negligence. *AM. ST. REP.*, VOL. XLII.—65

- negligence, if the statute of the state makes the owner answerable whether negligent or not. The statement of facts by plaintiff which were not required to perfect his cause of action did not forfeit his right to recover upon the facts which he was required to state. *Campbell v. Missouri Pac. Ry. Co.*, 530.
18. **GROSS NEGLIGENCE—ABSENCE OF SLIGHT** care in the management of a railroad train is gross negligence. *Greer v. Louisville etc. R. R. Co.*, 345.
19. **NEGLIGENCE—EVIDENCE**.—When, in an action against a railroad company, the only negligence relates to the act of driving or operating a train, it is prejudicial and reversible error to admit evidence as to the unsafe and defective condition of the track, or of any portion of the the train's makeup, or of plaintiff's physical condition. *Greer v. Louisville etc. R. R. Co.*, 345.
20. **MASTER AND SERVANT—FELLOW-SERVANTS**.—A fireman on a railroad train while acting as engineer is a superior employee to a brakeman thereon. *Greer v. Louisville etc. R. R. Co.*, 345.
21. **LIABILITY FOR NEGLIGENCE OF SUPERIOR SERVANT**.—A brakeman on a railroad train assumes the ordinary risks of going between moving cars; such risk is necessarily open and visible, but the company is liable for the gross negligence of its conductor and engineer, in failing to exercise any care for the protection of the brakeman while thus engaged. *Greer v. Louisville etc. R. R. Co.*, 345.
22. **A CONDUCTOR OF A RAILWAY TRAIN IS A VICE-PRINCIPAL**, for whose negligence the corporation is answerable to an inferior servant, if the negligence was in respect to regulating the movements of trains in opposite directions, whereby they came into collision with each other. *Railroad v. Spence*, 907.
23. **FELLOW-SERVANTS**.—A CONDUCTOR OF A RAILWAY TRAIN is not a fellow-servant of a fireman thereon, if the latter is under the control of the former, and required to submit to and obey his orders. The corporation is therefore answerable if such fireman is injured by the negligence of the conductor in passing a station when it was his duty to stop there until the arrival of another train, and, by reason of his not stopping, the two trains necessarily came into collision, from which the fireman received an injury. *Railroad v. Spence*, 907.
24. **SLEEPING-CAR CORPORATIONS ARE NOT ANSWERABLE AS INNKEEPERS** for the loss or theft of articles from their cars. *Pullman Palace Car Co. v. Gavin*, 902.
25. **SLEEPING-CAR CORPORATIONS OWE TO THEIR CUSTOMERS** the duty of maintaining a careful and continuous watch over the interior of the car while the berths are occupied by sleepers, and are liable if property of a passenger is stolen in consequence of the failure to maintain such careful and continuous watch. *Pullman Palace Car Co. v. Gavin*, 902.
26. **SLEEPING-CAR CORPORATION IS ANSWERABLE IF ONE OF ITS SERVANTS** or agents, charged with the duty of watching and protecting the property of a guest, steals it. *Pullman Palace Car Co. v. Gavin*, 902.
27. **SLEEPING-CAR CORPORATION CANNOT EXCUSE ITSELF FROM LIABILITY FOR MONEY STOLEN** from a passenger's berth during the night by one of its porters on the ground that such moneys did not belong to the passenger from whom they were taken, but had been intrusted to him to

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be kept for the use of a fellow-passenger. *Pullman Palace Car Co. v. White*, 902.

See CARRIERS; RECEIVERS, 1; STATUTES, 5.

RAPE.

1. **ATTEMPT TO COMMIT—CONVICTION FOR.**—Under an information charging rape the defendant may be convicted of an attempt to commit the offense. *State v. Frazier*, 274.
2. **ATTEMPT TO COMMIT—REQUIREMENT OF INFORMATION.**—A complaint charging the specific offense of an attempt to commit rape must set forth the acts done toward the commission of the offense. *State v. Frazier*, 274.
3. **ATTEMPT TO COMMIT—SUFFICIENCY OF INFORMATION—MOTION TO DISMISS.**—In an information charging an attempt to commit rape, a complaint that the defendant "unlawfully and feloniously did attempt to commit a rape, by then and there attempting to carnally know the victim" does not set forth any physical act done towards the commission of the offense. The information is therefore insufficient as against a motion to quash. *State v. Frazier*, 274.
4. **INFORMATION CHARGING RAPE AND ATTEMPT TO COMMIT FURTHER OFFENSE—EFFECT OF.**—Where an information contains two counts, the first charging rape, the second an attempt to commit rape, and the jury finds that the defendant is not guilty as charged in the first count, but is guilty as charged in the second count, all parts of the information must be considered in interpreting it; and when thus considered it appears that the jury intended to acquit only of the crime of rape, and not to acquit of the attempt to commit rape. The defendant is therefore, not entitled to an absolute discharge because of the acquittal upon the first count. *State v. Frazier*, 274.
5. **THE FACT THAT THE PROSECUTRIX WAS OF UNCHASTE CHARACTER.**—The fact that the prosecutrix was of unchaste character does not constitute any defense to a prosecution for a rape committed by her. *People v. Hartman*, 108.

RATIFICATION.

See INFANTS, 1, 12; MUNICIPAL CORPORATIONS, 5.

REAL PROPERTY.

See RAILROADS, 4-6; VENDOR AND PURCHASER, 1.

RECEIPTS.

See WAREHOUSEMEN, 1.

RECEIVERS.

1. **RECEIVERS HAVING THE EXCLUSIVE CONTROL AND CHARGE OF THE PROPERTY OF A RAILWAY CORPORATION.**—The receiver of a railway corporation, and of the management of its business, is bound to the same degree of care as the corporation itself would have been under the management of its board of directors, and in the same manner, liable in their official character for injuries resulting from the negligence of themselves or their agents and employees. *People v. Fordyce*, 516.
2. **ACTIONS AGAINST FOR NEGLIGENCE.**—By the act of Congress, March 3, 1887, every receiver may be sued in respect to any act or transaction in the management of the property of the corporation.

of his in carrying on the business, without the previous leave of the court in which he was appointed. This includes actions for the negligence of the receiver or of his employees or agents. *Fullerton v. Fordyce*, 516.

See TRUSTS, 12.

RECORDS.

See APPEAL, 1; CERTIORARI; COURTS; JUDGMENTS, 19; NOTICE, 1; VENDOR AND PURCHASER, 2; WITNESSES, 1.

REDEMPTION.

See MORTGAGES, 12; TRUSTS, 2.

REGISTRATION.

See TIME, 1.

REIMBURSEMENT.

See TRUSTS, 11.

RELATIONS.

See SERVICES.

REMAINDERS.

See DEEDS, 2; DEVISE, 1.

REPLEVIN.

1. **PLEADING AND EVIDENCE.**—In replevin, as in all other actions, the evidence should correspond to the allegations in the pleadings. If the plaintiff bases his right of possession on the claim of ownership of the property, or lien thereon, he should plead the facts as to such ownership or lien. The same is true if special ownership is claimed. *Musser v. King*, 700.
2. **CHATTEL MORTGAGE.—PRESUMPTION.**—In the absence of all evidence on the subject there is no presumption of law, in a replevin suit by the holder of a chattel mortgage, to recover possession of the property described therein from a third party, that the mortgagor was, at the time, either the owner or in possession of the property mortgaged. *Musser v. King*, 700.
3. **EVIDENCE — CHATTEL MORTGAGES — ASSIGNMENT.**—If, on an issue in replevin, as to the ownership and right of possession to the property, it appears that a note was given by a third party to a fourth for a debt, and was secured by a chattel mortgage on the property replevied, the note and mortgage, though assigned to the plaintiff, are not admissible in evidence, as they do not tend to prove the issue. *Musser v. King*, 700.
4. **JUDGMENT FOR PART OF PROPERTY, EFFECT OF.**—If a sheriff wrongfully levies upon a number of animals by virtue of an execution against another than the owner, and takes all of them from the possession of the owner at the same time and upon the same writ, a judgment in replevin in favor of the owner for a part of the animal is a bar to another action by him against the officer to recover the remainder. *Thieler v. Miller*, 302.

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RES GESTÆ.

See EVIDENCE, 5-8; HOMICIDE, 14.

RESISTING ARREST.

See HOMICIDE, 2, 3.

REVOCATION.

See CORPORATIONS, 13; LICENSE.

REWARDS.

1. IF A PERSON PROCLAIMS THAT HE IS DESIROUS OF OBTAINING A
LEGED LETTER, and will pay a reward for its production
who, in consideration of such proclamation and offer, produces
it and claims the reward is entitled to a judgment therefor.
Stump, 111.
2. PLEADING, WHETHER NECESSARY TO NEGATIVE REVOCATION.
A complaint alleges an offer of a reward, and that within five days
after in reliance thereon plaintiff performed the service required.
It need not aver that such offer had not been revoked or withdrawn.
If the offer was not limited in time, it will be presumed to have been
open during the fifth day after it was made. *Wilson v. Stump*.

RIPARIAN RIGHTS.

See WATERS, 3; WHARVES.

SALES.

1. PLACE OF.—If no place is designated by contract the place of
delivery is the point at which goods ordered or purchased are set apart and
delivered to the purchaser or to a common carrier, who, for the purpose of
delivery, represents him. *Perlman v. Sartorius*, 834.
2. PLACE OF—SUBSEQUENT CHANGE IN TERMS OF.—The place of sale of
goods in one state are sold by a resident thereof to a resident of
another state is not changed by a subsequent modification of the
terms of sale by letters written by the parties from their respective
residences. *Perlman v. Sartorius*, 834.
3. PLACE OF—INSOLVENT PURCHASER.—A sale of goods situated in one
state, by resident thereof to a resident of another state, where the
seller is in the latter state, consummated by delivery to a common
carrier in the former state, is a sale in that state, and governed by the
law thereof. *Perlman v. Sartorius*, 834.
4. A SALE ON CREDIT TO ONE WHO KNOWS HIMSELF TO BE INSOLVENT
and who has no reasonable expectation of paying for the goods
purchased, is void by the laws of Maryland. *Perlman v. Sartorius*.
5. DAMAGES FOR WARRANTY OF QUALITY AT WHAT TIME TO BE
CALCULATED.—For a breach of the warranty of the quality of property
sold, a purchaser is not always limited to the time of sale, but
may recover damages sustained up to the time when the defect was
discovered, or with ordinary care and attention might have been
discovered, if such damages were not with such care and attention
recoverable at the time the breach was made. *Shearer v. Park* 125.

- 6. NURSERYMAN, DAMAGES RECOVERABLE AGAINST FOR BREACH OF WARRANTY** as to kind of trees sold. If a nurseryman is applied to for trees of a certain class which he knows are to be used to be set out as part of an orchard, and he delivers trees of a different class which are set out and grown, until from the fruit borne by them it is certain they are not of the kind ordered, he is answerable for damages; and such damages may be ascertained by proving the value of the land occupied by the trees at the time when the breach of the warranty was discovered through their bearing fruit, and deducting the sum so ascertained from the value of the same land would have had at the same time if the trees ordered by the plaintiff had been planted and cultivated instead of the kind sold and cultivated by the plaintiff. *Shearer v. Park Nursery Co.*, 125.
- 7. OPTION TO RETAKE GOODS—ATTACHMENT LIEN.**—If one sells goods and delivers them, at prices and on terms of payment definitely fixed by the contract, but retains an election to retake all goods unsold by his vendee as his own, such vendor is not the owner of the goods until he exercises his right of election, and creditors who attach prior to such election acquire a valid lien. *Moline Plow Co. v. Rodgers*, 317.
- See **CHATTEL MORTGAGE**, 3; **GUARDIAN AND WARD**, 4-16; **VENDOR AND PURCHASER**.

SCIRE FACIAS

- 1. JUDGMENTS.—SCIRE FACIAS TO REVIVE** a judgment admits of no defense except one arising since its rendition. *Lauer v. Ketner*, 833.
- 2. JUDGMENTS.—SCIRE FACIAS TO REVIVE.—COVERTURE AS DEFENSE** cannot be pleaded or proved on a *scire facias* to revive a judgment, originally, entered and revived without indication that the parties defendant were husband and wife, and subsequently revived against them as husband and wife. It is presumed that the coverture took place after the first revival, and that the last revival was regular and authorized. *Lauer v. Ketner*, 833.

SEALS.

See **TAXES**, 4.

SECONDARY.

See **EVIDENCE**, 12.

SEDUCTION.

- 1. INDICTMENT—EVIDENCE—CHASTITY.**—In a criminal action for seduction the indictment need not aver, nor is it necessary to prove, primarily, the previous chastity of the female alleged to have been seduced, unless the statute makes her previous chaste character an ingredient in the offense. *Ferguson v. State*, 492.
- 2. SUFFICIENCY OF INDICTMENT.**—The fact that an indictment for the seduction of a female under promise of marriage fails to distinctly and positively aver that she was unmarried at the time the offense was committed is not ground for setting aside a verdict of conviction when the indictment and evidence reasonably show that the female seduced was unmarried. *Ferguson v. State*, 492.
- 3. PROMISE OF MARRIAGE.**—Seduction, accomplished under promise of marriage to be performed only on condition that pregnancy results from the intercourse, is not seduction within a statute punishing seduction

"under promise of marriage." Within the meaning of such statute seduction must be accomplished by means of an absolute promise of marriage, or one which becomes absolute the moment the woman yields. *State v. Adams*, 790.

4. **PROMISE OF MARRIAGE.**—On a trial for seduction, testimony by the prosecutrix that she first yielded her virtue to the accused because of his promise of marriage, and her reliance thereon, is admissible in evidence. *Ferguson v. State*, 492.
5. **EVIDENCE OF INTERCOURSE—IMMATERIAL ERROR.**—On a trial for seduction the admission of the testimony of the prosecutrix as to admitted acts of intercourse with the accused, and the birth of a child subsequent to the alleged seduction, though error, is not prejudicial to the accused, nor is it ground for setting aside a verdict of conviction. *Ferguson v. State*, 492.
6. **WHETHER THE ACCUSED WAS MARRIED OR UNMARRIED** at the time the offense was committed is wholly immaterial in a prosecution for seduction. *Ferguson v. State*, 492.
7. **CORROBORATION OF PROSECUTRIX.**—The crime of seduction under promise of marriage cannot be established by the uncorroborated testimony of the prosecutrix, and she must be corroborated by other evidence as to the promise of marriage and the act of sexual intercourse, but the corroborating evidence need not support all the necessary elements of the crime. *Ferguson v. State*, 492.

SELF-DEFENSE.

See **HOMICIDE**, 15, 16.

SERVICES.

1. **WHEN GRATUITOUS.**—Relationship, either by consanguinity or affinity, tends to rebut the presumption that a promise to pay is intended when personal services are rendered, but that fact alone does not overcome the presumption except as between parent and child. In all other cases there must be evidence beyond the relationship that the creation of no debt was intended. *Gerz v. Demarra*, 842.
2. **AGREEMENT TO PAY FOR—RELATIONSHIP.**—In an action by a son in law against the estate of his mother in law to recover for her board, evidence of declarations made by her to a third party that she had promised to pay for such board tends to show the existence of an agreement to pay therefor, and authorizes the submission of the question to the jury. *Gerz v. Demarra*, 842.

SERVITUDES.

See **WATERS**, 1.

SEWERS.

See **WATERS**, 2.

SHERIFFS.

See **LIENS**, 2, 3; **REPLEVIN**, 4.

SHIPPING.

1. **A PART OWNER OF A VESSEL** is not an agent of his co-owners when he takes it to sail on shares, agreeing out of its earnings to pay all

expenses, and to give the others a certain proportion of the proceeds. *Williams v. Hays*, 742.

2. **NEGLECT OF INSANE PERSON.**—If one of several owners of a ship is in charge thereof under a contract with the others, as lessee or bailee, and, on his attention being called to its peril, refuses to believe in such peril, though apparent, or to take any measures to avert it, and thereby the ship is lost, he is answerable to his co-owners for his negligence, though it was induced by his insanity at the time. *Williams v. Hays*, 742.

See MASTER AND SERVANT, 2.

SLEEPING-CAR COMPANIES.

See RAILROADS, 24-27

STATES.

See CONFLICT OF LAWS; CORPORATIONS, 39, 40; EVIDENCE, 9, 10; PUBLIC LANDS, 3; STATUTES, 4.

STATIONS.

See RAILROADS, 9-11.

STATUTE OF FRAUDS.

See CONTRACTS, 7-9; PLEADING, 2; VENDOR AND PURCHASER, 2.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES.

1. **CONSTITUTIONAL LAW—STATUTE EXEMPTING WAGES—TITLE OF ACT—CLASS LEGISLATION.**—It is sufficient if the title of an act, by general language, fairly expresses its subject matter, and the act applies to every one who falls within the purview of its provisions. Hence, "an act to provide better protection for the earnings of laborers, servants, and other employees of corporations, firms, or individuals, engaged in interstate business," is not unconstitutional, either as being broader than its title, or as being prohibited class legislation. *Singer Mfg. Co. v. Fleming*, 613.
2. **CONSTITUTIONAL LAW—STATUTE EXEMPTING WAGES—PENALTY.**—An act allowing one to recover money wrongfully taken from him, together with costs, expenses, and a reasonable attorney's fee, awards damages which are purely compensatory. Hence, an act exempting from attachment and execution the wages "of laborers, servants, and other employees of corporations, firms, or individuals engaged in interstate business," and which contains such a provision, is not unconstitutional as imposing a penalty for the benefit of an individual. *Singer Mfg. Co. v. Fleming*, 613.
3. **STATUTORY CONSTRUCTION.**—A special provision in a statute relating to a specific subject matter controls general provisions therein. *Richards v. Commissioners*, 650.
4. **ADOPTED STATUTES—RULE AS TO CONSTRUCTION OF.**—The rule that, when one state adopts the statute of another, it thereby adopts the construction placed on such statute by the highest court of the state from which

it is taken has no application when such construction is not placed on the statute until after its adoption. *Myers v. McGavock*, 627.

5. CONSTITUTIONAL LAW.—A STATUTE MAKING EVERY PERSON AND CORPORATION RESPONSIBLE IN DAMAGES for property injured or damaged by fire communicated directly or indirectly by locomotive engines in use upon railroads, without proof of negligence, is constitutional. *Campbell v. Missouri Pac. Ry. Co.*, 530.

6. CONSTITUTIONAL LAW—STATUTES—PART OF ACT INVALID, EFFECT OF.—Though part of an act is invalid the whole act is not therefore unconstitutional, unless it appears from an examination of the act itself that the invalid portion was designed as an inducement to pass the valid portion, so that the whole taken together will warrant the belief that the legislature would not have passed the valid portion alone. *Singer Mfg. Co. v. Fleming*, 613.

7. CRIMINAL LAW.—A STATUTE IMPOSING A GREATER PUNISHMENT FOR A SECOND OFFENSE, because of prior conviction for another offense, is not unconstitutional. It does not punish twice for the first crime. *State v. Moore*, 542.

See CORPORATIONS, 39, 40; EMINENT DOMAIN, 2; EVIDENCE, 9; GAME LAWS; GUARDIAN AND WARD, 7; INTERSTATE COMMERCE, 2; MECHANICS' LIENS, 8; TAXES, 9, 10.

STIPULATIONS.

A COURT MAY IN ITS DISCRETION RELIEVE a party from the effect of a stipulation submitting a cause on motion for a nonsuit. *Robinson v. Exempt Fire Co.*, 93.

See APPEAL, 1.

STOCK.

See CORPORATIONS, 9-14, 20-25; TAXES, 2.

STOCK BOARD.

See TAXES, 2.

STOCKHOLDERS.

See CORPORATIONS, 8-11, 28, 36, 37.

STREETS.

See DEDICATION, 1-3; EMINENT DOMAIN, 3-7; MUNICIPAL CORPORATIONS; RAILROADS, 3.

SUBROGATION.

1. SUBROGATION UNDER VOID SALES.—If a sale under a power in a mortgage with general warranty is subsequently declared void for any irregularity, a purchaser who has paid the purchase money may be subrogated to the rights of the mortgagee under the mortgage, which is regarded as assigned to him, and a subsequent purchaser under a partition sale of the land as the property of the purchaser at the mortgage sale is subrogated to all his rights. *Givens v. Carroll*, 889.

2. SUBROGATION UNDER VOID SALE—EXTENT OF.—A purchaser of land at a void sale under a power contained in a mortgage is subrogated to the rights of the mortgagee only to the extent of his claim against the land for the amount of purchase money paid by him, and a subsequent pur-

chase under a partition sale of the land as the property of the purchaser at the mortgage sale is only subrogated to the rights and equities of the latter, although he paid a larger sum. *Givens v. Correll*, 589.

2. **SUBROGATION UNDER VOID SALE—ACCOUNTING—INTEREST—RENTS.**—On an accounting between a mortgagor or his heirs and a purchaser at a void sale, under a power contained in the mortgage, or one who claims under him and has been in possession of the land for a number of years, the latter is entitled to recover the purchase money, paid under such sale, with interest added thereto annually, together with the amount expended for improvements and taxes, less the amount due for the rent of the land, deducted annually from such principal and interest. *Givens v. Correll*, 589.

SUMMONS.

See PROCESS.

SURETYSHIP.

1. **BOND DELIVERED CONTRARY TO CONDITION.**—A SURETY WHO EXECUTES A BOND, unofficial in character and perfect in form, cannot escape liability thereon by proving that he left it in the hands of his principal upon condition that it should not be delivered until another person had executed it as a cosurety, if such bond was delivered to the obligee named therein without notice to him of the condition relied upon. *Dun v. Garrett*, 937.
2. **DEFENSE THAT ANOTHER SHOULD HAVE SIGNED AS COSURETY.**—If a note negotiable in form is executed by one as a surety, and is left in the hands of the principal debtor upon condition that another shall also sign as surety before the delivery of the note, such note, though not signed by the other intended surety, is a valid and enforceable obligation as against the surety who signed it, if it has passed into the hands of a *bona fide* holder for value, and in due course of trade and before maturity. *Lookout Bank v. Aull*, 934.

TAX DEEDS.

See TAXES, 4-8.

TAXES.

1. **CONSTITUTIONAL LAW.**—The constitution of this state has not committed to the legislature the power of conclusively determining what facts are jurisdictional or vital to the exercise of the power of taxation or sale, divesting the title of property for the nonpayment of taxes. Such determination belongs to the judiciary. *Larson v. Dickey*, 595.
2. **A SEAT IN A STOCK OR EXCHANGE BOARD** is not taxable property, if such seat is merely the personal privilege of being and remaining a member of a voluntary association with the assent of the associates, and such privilege is not transferable without the assent of the association, and all its property is assessed to it for the purposes of taxation. *San Francisco v. Anderson*, 98.
3. **CORPORATIONS—INVESTMENT OF STOCK IN ANOTHER CORPORATION—TAXATION.**—A corporation, by investing part of its capital stock in the stock of another corporation, is not exempted from taxation against the part so invested on the ground that it is "invested in property which is otherwise taxable," within the meaning of a statute exempting stock

so invested from taxation. *Commercial etc. Ins. Co. v. Board of Revenue*, 17.

4. **TAX DEED—TREASURER'S SEAL.**—In the absence of a statute providing for a county treasurer's seal of office, such officer cannot execute a tax deed of any validity under a statute requiring the execution of such deed to be "under the official seal of his office." *Larson v. Dickey*, 595.
5. **CONSTITUTIONAL LAW—TAX DEEDS AS EVIDENCE.**—The legislature has the power to make tax deeds *prima facie* evidence that every requirement of the law necessary to their validity has been complied with. *Larson v. Dickey*, 595.
6. **CONSTITUTIONAL LAW—TAX DEEDS AS EVIDENCE.**—The legislature has power to make tax deeds conclusive evidence of compliance with all the requirements of the law which are merely directory, and which pertain to the regulation or the manner of exercising the taxing power, and which requirements it might, in the exercise of its discretion, dispense with entirely. *Larson v. Dickey*, 595.
7. **CONSTITUTIONAL LAW—TAX DEEDS AS EVIDENCE.**—The legislature has no power to make tax deeds conclusive evidence of any jurisdictional fact, or fact vital to the exercise of the power of taxation or sale, divesting the title of property for the nonpayment of taxes. *Larson v. Dickey*, 595.
8. **CONSTITUTIONAL LAW—TAX DEED AS EVIDENCE.**—It is not within the power of the legislature to make a tax deed conclusive evidence of the fact that the grantee named therein was the purchaser, or his assignee, of the property at the tax sale. *Larson v. Dickey*, 595.
9. **A TAX IS NOT A DEBT** capable of enforcement generally by a civil action. If an action is permitted, it is only because the statute expressly provides therefor, or by failing to provide any method, necessarily implies a right of action. *Richards v. Commissioners*, 650.
10. **METHOD OF ENFORCEMENT AND COLLECTION—ACTION.**—A method prescribed by statute of enforcing and collecting taxes is exclusive; and, if the statute embraces a right of action, the conditions and manner of the action, as specified by the statute, must be strictly observed, or the action will not lie. *Richards v. Commissioners*, 650.

See COTENANCY; INTERSTATE COMMERCE, 1; MUNICIPAL CORPORATIONS, 6; SUBROGATION, 3.

TELEGRAPH COMPANIES.

See INTERSTATE COMMERCE, 1.

TENANTS IN COMMON.

See COTENANCY.

TENDER.

1. **EFFECT OF—WHEN ACTUAL TENDER UNNECESSARY.**—A tender of the whole sum due, principal and interest, at any time after the debt falls due, but before suit is brought, stops the interest and discharges the party from the costs of a subsequent suit; and actual tender of the money is dispensed with if the debtor is ready and willing to pay, and about to produce it, but is prevented by the creditor declaring he will not receive it. *McCalley v. Otey*, 87.
2. **DENIAL OF—BURDEN OF PROOF.**—When the making of a tender is denied the burden of proof is on the debtor, who seeks to avail himself of

the benefit of the tender, to show that he was ready all the time after the tender was made, and willing to pay the amount tendered upon the demand of the creditor. *McCalley v. Okey*, 87.

See INTEREST; MORTGAGES, 12.

THEFT.

See RAILROADS, 24-25.

TIDE LANDS.

See PUBLIC LANDS, 3.

TIME.

1. **LIENS—FRACTIONS OF DAYS ARE CONSIDERED** in determining the priority of judgment liens arising from registration under a statute which, as between the different acts of registration, gives priority to the one first done. The judgment first filed is entitled to priority over one filed at a subsequent time on the same day. *German Security Bank v. Campbell*, 55.
2. **LIENS—FRACTIONS OF DAYS, WHEN CONSIDERED.**—Whenever it is provided by statute that a lien shall attach upon the doing of an act by or on behalf of the party who asserts it, or seeks to fasten it upon property, fractions of a day are considered in determining the priority and consequent superiority as between liens resulting from or resting severally upon acts done on the same day. *German Security Bank v. Campbell*, 55.

TORTS.

See INSANE PERSONS, 2, 3.

TRACING FUNDS.

See TRUSTS, 12, 13.

TRESPASS.

AN ACTION OF TRESPASS MAY BE MAINTAINED BY ONE HAVING THE EXCLUSIVE POSSESSION of the property at the time of a trespass committed by a stranger having neither title in himself nor authority from the legal owner. *Pullman Palace Car Co. v. Gavin*, 902.

See INSANE PERSONS, 2; LIENS, 2, 3; PROCESS, 2, 3.

TRIAL.

1. **THE FACTS STATED IN AN OFFER OF PROOF** must be taken as true if the offer is refused and the proposed evidence excluded. *Beardslee v. Dolge*, 707.
2. **NOTICE OF MOTION IS WAIVED** if the party is in court at the time the motion is made, and, without objecting to the want of notice, proceeds to argue the question involved, and, when it is decided against him, takes a general exception to the ruling. *Herman v. Santee*, 145.
3. **OBJECTIONS TO EVIDENCE.**—Unless evidence is admissible for any purpose, a party is not at liberty under a general objection to afterwards urge a special objection going merely to the form of the question by which the evidence was sought. *Euchus v. Los Angeles etc. Ry. Co.*, 149.
4. **PERSONAL EXAMINATION OF A PARTY TO THE ACTION—DISCRETION OF THE COURT.**—The ordering of personal examination of a party to an action

is within the discretion of the court, and its refusal to make such order should not be interfered with, unless its discretion was clearly abused. *Fullerton v. Fordyce*, 516.

5. AN INSTRUCTION ASSUMING that the plaintiff in an action for personal injuries was injured in his hip and spine, when there is a conflict of evidence as to such injuries, is insufficient, and a verdict so large that it apparently resulted from a consideration of these injuries will be set aside. *Fullerton v. Fordyce*, 516.
6. FINDINGS—GENERAL AND SPECIAL—JUDGMENT.—In actions tried by the court there must be a general finding, and, if requested by one of the parties, a special finding. A vague, uncertain, or indefinite special finding will not support a judgment upon a direct attack. *Kirkwood v. First Nat. Bank*, 683.
7. JURORS—INCOMPETENCY—EFFECT ON VERDICT.—A mistake as to a juror, whereby one not competent and not drawn but summoned by mistake, having the same name, attended and was accepted and served on the jury at the trial, is not ground for setting aside the verdict. Such mistake does not impugn the fairness of the trial nor present a ground for a new trial. *Tolbert v. State*, 454.
8. RIGHT OF ACCUSED TO BE PRESENT.—A motion to quash an indictment does not constitute any part of the trial, and the accused is not entitled, as of right, to be present upon the hearing of such motion. *State v. Atkinson*, 877.
9. RIGHT OF ACCUSED TO BE HEARD.—A person accused of crime, who appears through counsel and demurs to the indictment, and makes a motion to quash it, thereby elects to be heard by counsel, and is not entitled to be heard by himself. *State v. Atkinson*, 877.
10. JURY TRIAL.—A PARTY ACCUSED OF CRIME AND DENIED THE RIGHT TO A PUBLIC TRIAL is not required to show that he was injured by reason of the deprivation. He is, without making any such showing, entitled to have his conviction set aside. *People v. Hartman*, 108.
11. JUROR—DISQUALIFICATION.—A juror is not shown to be disqualified from the fact that he did not pay any personal taxes for the preceding year where it does not appear that he was not upon the personal property assessment-roll, or that he did not own and pay taxes on real estate. *State v. Reed*, 322.

TROVER.

JUDGMENT IN TROVER, EFFECT OF ON THE TITLE TO PROPERTY.—A judgment in trover does not transfer the title to the property. Such title remains in the plaintiff until he receives satisfaction; nor does the fact that he attaches the property upon mesne process in the action of trover, and after obtaining judgment therein levies upon it as the property of the judgment debtor, constitute an irrevocable election to treat the title to such property as vested in the defendant. *Miller v. Hyde*, 424.

See APPEAL; NEW TRIAL.

TRUST DEEDS.

See TRUSTS, 3, 7, 8.

TRUSTS.

1. IF A TRUST IS EXPRESSED IN THE INSTRUMENT CREATING IT any act done by the trustees in contravention of the trust is void. *Kirsch v. Tenier*, 729.

2. PERSONS DEALING WITH A TRUSTEE MUST TAKE NOTICE of the scope of his authority. *Kirsch v. Tosier*, 729.
3. TRUST DEED, TERMS OF MUST CONTROL.—If a trust deed provides for a sale for cash with the right of redemption, the court has no power to direct a sale on a credit of six months and barring the right of redemption. *Clark v. Jones*, 931.
4. A TRUSTEE FOR THE BENEFIT OF MINORS HAS NO IMPLIED AUTHORITY to accept payment of a mortgage before it is due, and a purchaser is not protected by a satisfaction of such mortgage entered by a trustee before its maturity, if, as a matter of fact, such entry was in contravention of his trust. *Kirsch v. Tosier*, 729.
5. THAT A SATISFACTION OF A MORTGAGE MADE BY A TRUSTEE WAS IN CONTRAVENTION OF HIS TRUST is a fact of which a purchaser or encumbrancer must take notice, when it appears by the record that such mortgage was received by the mortgagee as trustee of certain minors, that he afterwards became the owner of the property subject to the mortgage, and thereafter satisfied it before it was due, and while his interests were adverse to those of his beneficiaries. *Kirsch v. Tosier*, 729.
6. A TRUST DEED MAY BE FORECLOSED, and it is not necessary to sustain a suit in foreclosure that a demand should have been made on the trustee, and that he should have refused to execute the trust, and that its execution should have been impeded by any person or cause. *Clark v. Jones*, 931.
7. TRUST DEED.—THE COSTS OF FORECLOSING A TRUST DEED made to secure a debt must be borne by the creditor, unless there was some reason why he did not resort to the less expensive remedy of a sale by the trustee without judicial proceedings. *Clark v. Jones*, 931.
- TRUST DEED, TERMS OF MUST CONTROL.—If a trust deed provides for a sale for cash with the right of redemption the court has no power to direct a sale on a credit of six months and barring the right of redemption. *Clark v. Jones*, 931.
- TRUSTEE'S FEE FOR FORECLOSING A TRUST DEED WILL NOT BE ALLOWED when the note to secure which it was given stipulated for the payment of a reasonable attorney's fee if necessary to resort to suit, if, as a matter of fact, the trustee was willing to proceed under the power retained in the deed, and the proceedings on the part of the attorney were unnecessary. *Clark v. Jones*, 931.
- TRUSTEE AND BENEFICIARIES—ACTIONS AGAINST—NECESSARY PARTIES.—The trustee and his cestui que trust are so far independent of each other that an action against one has no effect upon the other, and both are essential parties to a complete determination of any action in reference to the trust estate. *Roberts v. Yancy*, 357.
- TRUSTEE AND BENEFICIARIES—JUDGMENTS AGAINST.—A judgment against a cestui que trust, the trustee not being a party, does not bind him, and he, in an action, that seeks to subject the trust estate to the satisfaction of that judgment, may contest its correctness, and show that it is void. *Roberts v. Yancy*, 357.
- TRUSTEE—RIGHT TO COMPENSATION AND REIMBURSEMENT.—A trustee is entitled to reasonable compensation for executing a trust, without any express agreement therefor, and also to reimbursement for any outlay made by him in the legitimate execution of the trust. *Nelson v. McCall*, 468.

13. TRACING FUNDS.—Although trust property may be followed by a court of equity through all its transmutations, whether its identity and individuality are preserved or merged in a mass of which it forms a part, the right to so follow it rests upon the equitable title of the beneficiary, who, seeking to recover specific property or to fix a charge upon a mass, must trace his estate, and show that the specific thing claimed is in equity his property, or that his estate has gone into, and remains in, the mass he seeks to charge. *Shields v. Thomas*, 458.

14. TRACING FUNDS IN HANDS OF RECEIVER.—No lien upon, or priority in, money in the hands of a receiver of an insolvent bank can be given for funds deposited therein before the insolvency, by a tax-collector, in the absence of proof that the funds so deposited form any part of the money in the hands of the receiver, either in their original or transmuted form or as a part of the mass of the assets of the bank. *Shields v. Thomas*, 458.

ULTRA VIRES.

See ASSOCIATIONS, 2; CORPORATIONS, 26-35; MUNICIPAL CORPORATIONS, 5.

USER.

See DEDICATION.

VACANT AND UNOCCUPIED.

See INSURANCE, 3, 4.

VENDOR AND PURCHASER.

1. NOTICE OF OCCUPANT'S RIGHTS.—A purchaser of real property in the actual possession and occupancy of another is charged with notice of any right, title, or interest which the occupant has in such property. *Pleasants v. Blodgett*, 624.

2. VENDOR AND PURCHASER—RECORD OF MORTGAGE AS NOTICE—PRESUMPTION.—The existence of record of a mortgage on real estate is of itself sufficient to put an intending purchaser of the property on inquiry as to the interest of the mortgagor in such real estate. The presumption is that the mortgagor is the owner of the property mortgaged. *Pleasants v. Blodgett*, 624.

3. STATUTE OF FRAUDS.—If the question at issue is one of equities between two parties holding deeds for the same property from the same grantor the statute of frauds is inapplicable. *Pleasants v. Blodgett*, 624.

4. A MISREPRESENTATION AS TO THE FREQUENCY OF THE TIMES OF DEPARTURE AND ARRIVAL OF TRAINS at a railway station in the vicinity of Boston, near a dwelling-house, tends greatly to affect the value of the property, and may therefore be fraudulent. *Holt v. Stewart*, 442.

5. MISREPRESENTATION, CARELESSNESS IN ACTING UPON.—One who employs brokers to effect an exchange of his property, and who, on visiting property for which it was proposed to effect an exchange, asks the time when the trains arrive and depart from an adjacent railway station, and is then assured by such broker, who falsely purports to read from a time-table, that such departures and arrivals are at certain times, cannot as a matter of law be held to have been so reckless in trusting the broker as to be precluded from recovering for the fraud practiced upon him in regard to the trains. *Holt v. Stewart*, 442.

6. MISREPRESENTATIONS, WHEN ACTIONABLE.—A misrepresentation to an intending purchaser of real property as to the time when trains arrive

therein which cannot be taken for public use or otherwise without due process of law and compensation therefor. *Louis v. Portland*, 772.

WILLS.

1. **RIGHT OF DISINHERITED CHILD INHERITING FROM DEVISEE.**—A child of a testator, excluded from inheriting under the terms of his will, having inherited an interest in the property devised, by the death of one of the devisees, is entitled to have the property divided, and her interest allotted to her, or, if the property is not susceptible of division, then to have it sold, and her share of the proceeds of the sale allotted to her. *Haselett v. Farthing*, 365.
2. **HOMESTEAD RIGHTS.**—A husband may dispose of his homestead by will in any manner he may choose, subject only to right of his widow to renounce the will and claim under the statute. *Haselett v. Farthing*, 365.

See CONTRACTS, 4; DEEDS, 1; DEVISE; HOMESTEAD, 2.

WITNESSES.

1. **EVIDENCE—RECORDS—WITNESSES.**—Upon an issue as to whether a particular fact is of record, any person who has examined the books where it should be found, and shows a sufficient knowledge of their contents, is competent to testify that such fact does not appear of record therein. *Gutta Percha Mfg. Co. v. Ogallala*, 696.
2. **EVIDENCE—CONFIDENTIAL COMMUNICATIONS—HUSBAND AND WIFE.**—A letter written by a husband to his wife while he is imprisoned on a charge of murder, and voluntarily surrendered by her, is a confidential communication, not admissible in evidence against him on his trial, especially when its effect is to lessen the force of the testimony tending to show that the deceased and the wife of the accused were criminally intimate, and that the murder was committed in sudden passion and excitement produced by a knowledge of that fact. The admission of such letter in evidence is prejudicial and reversible error. *Scott v. Commonwealth*, 371.
3. **OPINION EVIDENCE.**—On a criminal trial a witness may testify to the peculiarities of the foot of the accused, and how these peculiarities were reproduced in a certain foot-track; but he cannot give his opinion that such track was made by the accused. *State v. Green*, 872.
4. **EVIDENCE—OPINIONS OF WITNESS, QUESTION NOT OBJECTIONABLE AS CALLING FOR.**—A witness who saw the plaintiff on a specified occasion may be asked whether or not he was apparently well. The witness, though not an expert, should be permitted to state the result of his observation as to the state of a person's health or other characteristic or state which manifests itself to the apprehension of a common observer, notwithstanding the statement of the witness involves his opinion or judgment. *Robinson v. Exempt Fire Co.*, 93.
5. **EXPERTS—CREDIBILITY.**—An instruction that the evidence of expert witnesses is "to be received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous," is fatally erroneous, for the reason that expert evidence is to be received and treated by the jury precisely as other testimony. *Louisville etc. Ry. Co. v. Whitehead*, 472.
6. **EXPERT EVIDENCE—CREDIBILITY.**—The weight to be given to expert evidence must be determined by the character, the capacity, the skill, the

opportunities for observation, and the state of mind of the experts themselves, as seen, heard, and estimated by the jury, and by the nature of the case and all its developed facts. *Louisville etc. Ry. Co. v. Whitehead*, 472.

7. EVIDENCE—HANDWRITING—FORGED SIGNATURES—EXPERTS—IMPROPER CROSS-EXAMINATION.—On an issue as to the genuineness of the defendant's signature to a promissory note it is error to allow the defendant on cross-examination to show plaintiff's expert witnesses a number of papers to which defendant's name is attached, which are not in evidence in the case and concerning the genuineness of the signatures to which no evidence has been introduced, and then ask them to give their judgment as to the genuineness of such signatures, from a comparison with those already in evidence, and admitted by both parties to be genuine; to afterwards introduce such papers in evidence, and then to prove by another witness that such witness himself wrote the signatures to such papers. *Gaunt v. Harkness*, 297.

8. EVIDENCE—PROOF OF HANDWRITING BY COMPARISON.—On an issue as to the genuineness of a signature, writings, not a part of the case, and not shown by evidence to be genuine, should not be admitted in evidence, either on the direct or cross examination of an expert witness, for the purpose of proving handwriting by comparison. *Gaunt v. Harkness*, 297.

See HOMBOLDT, 6; INDIOTMENT, 2; NEW TRIAL, 6.

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